Adams & Associates, Inc. and McConnell, Jones, Lanier & Murphy, LLP *and* Sacramento Job Corps Federation of Teachers, AFT Local 4986, American Federation of Teachers. Cases 20–CA–130613 and 20–CA–138046

May 17, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

On June 16, 2015, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The General Counsel filed exceptions and a supporting brief, Adams & Associates, Inc. (Adams) filed an answering brief, and the General Counsel filed a reply brief. Adams and McConnell, Jones, Lanier & Murphy, LLP (MJLM) also filed exceptions, cross exceptions, and supporting briefs, and the General Counsel filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified,[2] to amend the recommended remedy,[3] and to adopt the recommended Order as modified and set forth in full below.[4]

I. INTRODUCTION

Adams and MJLM (collectively the Respondent) operate Job Corps Youth Training Centers under contracts with the Department of Labor (the DOL). The allegations in this case arose from the Respondent's successful bid to operate a Job Corp Youth Training Center in Sacramento, California, that was previously operated by Horizons Youth Services, LLC. We agree with the judge, essentially for the reasons she states, that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily refusing to hire five incumbent employees in order to avoid an obligation to bargain with the Sacramento Job Corps Federation of Teachers, AFT Local 4986, American Federation of Teachers (Union),[5] and that the Respondent violated Section 8(a)(5) and (1) by unilaterally imposing initial terms and conditions of employment on the unit employees and banning Union President Genesther Taylor from the Center.[6] We further agree with the judge, for the reasons she states, that MJLM and Adams are joint employers, and we adopt the judge's finding that MJLM and Adams are jointly and severally liable for the unfair labor practices.[7]

We also find, however, contrary to the judge, that the Respondent is a "perfectly clear" successor within the meaning of *Spruce Up Corp.,* 209 NLRB 194, 195 (1974), enfd. per curiam 529 F.2d 516 (4th Cir. 1975), and that this independently made unlawful its unilateral setting of initial terms. We additionally find that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Union President Genesther Taylor because of her union activities, as well as to avoid a bargaining obligation.

[1] There are no exceptions to the judge's finding that the Respondent did not violate Sec. 8(a)(5) and (1) by unilaterally discontinuing dues checkoff.

Adams has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We have amended the judge's conclusions of law consistent with our findings.

[3] We have amended the judge's recommended remedy to conform to the violations found and to better effectuate the policies of the Act. We have also modified the judge's recommended tax compensation and Social Security reporting remedy in accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016).

[4] We shall modify the judge's recommended Order to conform to the violations found, to our amended remedy, and to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB 694 (2014).

[5] Adams excepted to admission of General Counsel Exhibits 11(a)–(b) and (d)–(l) and certain testimony on the grounds that they were protected by the attorney-client privilege. In adopting the refusal-to-hire violations, we find it unnecessary to rely on General Counsel Exhibits 11(d), (g), and (h) or the testimony of Adams' former Executive Director for Human Resources Valerie Weldon regarding her conversation with Adams' executive director, Jimmy Gagnon, concerning whether to hire certain incumbent employees. We find that other record evidence establishes that the Respondent's refusal to hire the five incumbent employees was motivated by a desire to avoid a bargaining obligation.

[6] In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by barring Taylor from the Center, we find it unnecessary to rely on the judge's findings that the Respondent's conduct was motivated by antiunion animus or that the Respondent selectively and disparately enforced its access rule against Taylor.

[7] In adopting the judge's finding that MJLM and Adams are jointly and severally liable for the unfair labor practices, we emphasize that MJLM does not contend that it neither knew, nor should have known, of Adams' unlawful actions. Nor does it contend that it took all measures within its power to resist those actions. Under established precedent, therefore, a finding of joint liability is appropriate. *Capitol EMI Music,* 311 NLRB 997, 1000 (1993) (burden on the joint employer seeking to escape liability for the other employer's unlawfully motivated action to show that "it neither knew, nor should have known, of the reason for the other employer's action or that, *if* it knew, it took all measures within its power to resist the unlawful action" (emphasis in original)), enfd. 23 F.3d 399 (4th Cir. 1994).

II. "PERFECTLY CLEAR" SUCCESSORSHIP

A. Factual Background

In early 2014, MJLM successfully bid on a contract to operate a Job Corps Youth Training Center in Sacramento, California (the Center), that was previously operated by Horizons Youth Services, LLC (Horizons or the predecessor).[8] Horizons and the Union had a collective-bargaining relationship. Their most recent collective-bargaining agreement was effective by its terms from September 1, 2010, until June 30, 2013, and was extended through March 9, 2014. The unit included "All full-time Residential Advisors, Non-Residential Advisors, and Day Residential Advisors employed at the [Center]" (collectively, RAs or unit employees).

On February 7, the Union was informed by Horizons that MJLM had been awarded the contract to operate the Center, along with its subcontractor, Adams. By letter dated February 11, the Union notified MJLM that it was the exclusive collective-bargaining representative of the unit employees, and it requested information regarding the hiring process. By email dated February 13, Adams responded in relevant part:

> [P]lease be advised that Adams and Associates, Inc., as a first-tier subcontractor of MJLM, will be responsible for the hiring and employment of Residential Advisors at the Sacramento Center. Adams will follow all applicable laws and regulations regarding the interview and hiring process. This of course will include discussion and/or negotiation of a collective bargaining agreement, if required, once the transition is complete.

Also on February 13, Adams Executive Director Jimmy Gagnon met with incumbent employees to announce the transition and to inform them about the hiring process. Gagnon began by stating that the employees had been "doing a really good job" and that Adams "didn't want to rock the boat" and "wanted a smooth transition." When the meeting was opened for questions, RA Genesther Taylor identified herself as the Union president and asked about the availability of RA positions and what might prevent an incumbent employee from being hired. Gagnon responded that, "aside from disciplinary issues, he was 99 percent sure that [they] would all have a job." Gagnon also mentioned, however, that Adams planned to reduce the number of RAs at the Center from 25 to 15. Taylor then raised a concern about student-staff ratios, to which Gagnon responded that "there would be a new position that was being introduced . . . called a residential coordinator [and] . . . also that the supervisors would be in the dorms to help with interacting with the students and monitoring the dorms." The Horizons employees were then invited to review job descriptions of available positions and to apply for up to two.[9] Taylor requested, but was not permitted, to retain copies of the job descriptions. Instead, employees were allowed only "a couple of minutes" to review the job descriptions, and they were then escorted out of the room. Employees were given 24 hours to return completed applications.

By letter dated February 14, the Union demanded that Adams recognize and bargain with it as the exclusive bargaining representative of the unit employees. Adams did not respond.

Between February 28 and March 10, applicants to whom Adams extended offers of employment signed offer letters. In pertinent part, the offer letters:

- specified the wage rate (which was the same as the RAs' wage rate under Horizons);
- stated that they were "eligible for all Company-sponsored benefits, as defined by our Human Resources Policies";
- set forth their schedule (which for some incumbent RAs differed from their schedule under Horizons);
- stated that "Adams and Associates reserves the right to adjust work schedules as a business necessity and/or to meet program service needs"; and
- stated that employment would be "at-will and there is no written or implied contract for continued employment. . . . Adams and Associates is free to terminate your employment at any time for any reason except as may be prohibited by law."

Successful RA applicants also signed employment agreements before commencing work for Adams. The employment agreements provided, among other things, that:

- employment would be at-will;
- employees would be subject to Adams' disciplinary policies and procedures; and
- employees would be required to resolve employment-related disputes though mandatory arbitration.

[8] All dates are in 2014 unless otherwise specified.

[9] Hence, incumbent RAs could apply for an RA and a residential coordinator (RC) position or any two positions for which MJLM and Adams were hiring. Therefore, Gagnon's statement that he was 99 percent sure that all incumbent RAs would have a job absent disciplinary problems was not irreconcilable with his statement that Adams was reducing the number of RAs from 25 to 15.

On March 11, the Respondent began operating the Center in basically unchanged form. On that date, the Respondent employed 15 RAs, 9 of whom (a majority) were former unit employees. On and after March 11, consistent with the offer letters and employment agreements, the Respondent unilaterally implemented certain changes in the unit employees' terms and conditions of employment, including ceasing to give effect to the progressive discipline, just cause, and grievance provisions of Horizons' most recent collective-bargaining agreement with the Union; implementing new disciplinary policies and procedures, at-will employment, and a mandatory arbitration policy for employment-related disputes; modifying the terms of the existing probationary period; eliminating existing health benefits; and changing from a fixed shift schedule to a rotating shift schedule for some RAs. The Respondent also unilaterally transferred bargaining unit work outside of the collective-bargaining unit by assigning residential advisor work to the functionally equivalent position of residential coordinator.

B. Analysis

Under *NLRB v. Burns Security Services*, 406 U.S. 272, 281–295 (1972), a successor is not bound by the substantive terms of a collective-bargaining agreement negotiated by the predecessor and is ordinarily free to set initial terms and conditions of employment unilaterally. The Court explained that the duty to bargain will not normally arise before the successor sets initial terms because it is not usually evident whether the union will retain majority status in the new workforce until after the successor has hired a full complement of employees. Id. at 295. The Court recognized, however, that "there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." Id. at 294–295.

In *Spruce Up Corp.,* 209 NLRB 194 (1974), enfd. per curiam 529 F.2d 516 (4th Cir. 1975), the Board interpreted the "perfectly clear" caveat in *Burns* as "restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." Id. at 195 (footnote omitted). The Board reasoned that "[w]hen an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer 'plans to retain all of the employees in the unit,' as that phrase was intended by the Supreme Court" because of the possibility that many of the employees will reject employment under the new terms, and therefore the union's majority status will not continue in the new workforce. Id.

In subsequent cases, the Board has clarified that, although the Court in *Burns*, and the Board in *Spruce Up*, spoke in terms of a "plan[] to retain *all* of the employees in the unit" (emphasis added), the relevant inquiry is whether the successor "[p]lanned to retain a sufficient number of predecessor employees to make it evident that the Union's majority status would continue" in the new workforce. *Galloway School Lines*, 321 NLRB 1422, 1426–1427 (1996); *Spitzer Akron, Inc*., 219 NLRB 20, 22 (1975) ("Clearly, the phrase 'plans to retain all the employees in the unit,' . . . would cover not only the situation where the successor's plan includes every employee in the unit, but also situations where it includes a lesser number but still enough to make it evident that the union's majority status will continue."), enfd. 540 F.2d 841 (6th Cir. 1976), cert. denied 429 U.S. 1040 (1977).

The Board has also clarified that the exception is not limited to situations where the successor fails to announce initial employment terms before the hiring process begins. Rather, the bargaining obligation attaches when a successor expresses an intent to retain the predecessor's employees without making it clear that employment will be conditioned on acceptance of new terms. *Canteen Co.,* 317 NLRB 1052, 1053–1054 (1995), enfd. 103 F.3d 1355 (7th Cir. 1997).[10] The Board has consistently held, moreover, that a subsequent announcement of new terms, even if made before formal offers of employment are extended, or before the successor commences operations, will not vitiate the bargaining obligation that is triggered when a successor expresses an intent to retain the predecessor's employees without making it clear that their employment is conditioned on the acceptance of new terms.[11] Thus, to avoid "perfectly

[10] In *Canteen*, the Board found that a successor "effectively and clearly communicated . . . its plan to retain the predecessor employees" by expressing to the union its desire to have the employees serve a probationary period without mentioning any changes in employment conditions. Therefore, it became a perfectly clear successor at that point, and "was not entitled to unilaterally implement new wage rates" the next day, during employment interviews. Id., citing *Fremont Ford Sales*, 289 NLRB 1290, 1296–1297 (1988); *Roman Catholic Diocese of Brooklyn*, 222 NLRB 1052 (1976), enf. denied in relevant part sub nom. *Nazareth Regional High School v. NLRB*, 549 F.2d 873 (2d Cir. 1977).

[11] See, e.g., *DuPont Dow Elastomers LLC*, 332 NLRB 1071, 1074 (2000) ("The Board has consistently found that an announcement of new terms will not justify a refusal to bargain if . . . the employer has

clear" successor status, a new employer must clearly announce its intent to establish a new set of conditions prior to, or simultaneously with, its expression of intent to retain the predecessor's employees.[12]

Application of the above principles to the facts of this case compels a conclusion that the Respondent became a "perfectly clear" successor on February 13. Gagnon clearly manifested an intent to retain the incumbent RAs when he stated at the February 13 meeting that they had been "doing a really good job," that Adams "didn't want to rock the boat" and "wanted a smooth transition," and that, "aside from disciplinary issues, he was 99 percent sure that [they] would all have a job." See *Hilton's Environmental, Inc*., 320 NLRB 437, 438 (1995) (new employer expressed an intent to retain incumbent employees when it solicited applications and assured employees that they would all be hired unless some problem arose as a result of information disclosed on their applications or in the interview process); *Fremont Ford*, 289 NLRB at 1296–1297 (new employer expressed an intent to retain incumbent employees when it told the union it had doubts about retention of only a few unit employees).

Consistent with the principles discussed above, therefore, in order to preserve its authority to set initial terms and conditions of employment unilaterally and avoid "perfectly clear" successor status, the Respondent was required to "clearly announce its intent to establish a new set of conditions" on or before February 13. *Spruce Up,* 209 NLRB at 195; *Canteen,* 317 NLRB at 1052–1054. The Respondent, however, did not inform the employees that employment would be on new terms until the hiring process was nearly complete, when it distributed offer letters and employment agreements to successful applicants.

In her decision, the judge placed considerable weight on Gagnon's announcement on February 13 that the Respondent planned to reduce the number of RAs. In light of that announcement, the judge found that the Respondent was not a "perfectly clear" successor because it "did not actively or tacitly express a clear intention that it would retain all 25 incumbent RAs." The judge also found that the announcement should have signaled to the incumbent RAs that terms and conditions would differ from those they enjoyed under the predecessor.[13]

As discussed above, however, the Board has held that to become a "perfectly clear" successor, a new employer need not retain *all* of the employees in the unit. Rather, the relevant inquiry is whether the successor intends to retain a sufficient number to continue the union's majority status. *Galloway School Lines*, 321 NLRB at 1426–1427; *Spitzer Akron*, 219 NLRB at 22. By telling the incumbent RAs on February 13 that they had been "doing a really good job" and that, "aside from disciplinary issues, he was 99 percent sure that [they] would all have a job," Gagnon expressed an intent to retain a sufficient number of incumbent RAs to continue the Union's majority status in the Respondent's new workforce. And the Respondent did, in fact, hire a majority of employees.

In sum, we find that the Respondent is a "perfectly clear" successor and, for this additional and independent

earlier expressed an intent to retain its predecessor's employees without indicating that employment is conditioned on acceptance of new terms."), enfd. 296 F.3d 495 (6th Cir. 2002); *Canteen*, 317 NLRB at 1053–1054; *Starco Farmers Market,* 237 NLRB 373, 373 (1978) (explaining that "[W]here the new employer's offer of different terms was simultaneous with the expression of intent to retain the predecessor's employees, the Board has found no duty to bargain over initial employment terms. However, where the offer of different terms was subsequent to the expression of intent to retain the predecessor's employees, the Board has regarded the expression of intent as controlling and has found that the new employer was obligated to bargain with union before fixing initial terms." (internal citations omitted)); *Roman Catholic Diocese of Brooklyn*, 222 NLRB at 1055 (obligation to bargain over initial terms commenced when the chairman of the new employer's board of trustees expressed an intent to retain the predecessor's employees without mentioning any changes in preexisting terms; obligation was not vitiated when promise to retain was later disavowed and employees were specifically informed—before formal offers of employment were extended and operations began—that employment would be on new terms and that the new employer "has no intention of being bound by the terms and conditions of employment which prevailed" under the predecessor).

[12] See, e.g., *Elf Atochem North America, Inc.*, 339 NLRB 796, 807 (2003) (successor incurs "obligation to bargain over initial terms of employment when it displays an intent to employ the predecessor's employees without making it clear to those employees that their employment will be on terms different from those in place with the predecessor employer"); *Helnick Corp,* 301 NLRB 128, 128 fn. 1 (1991) (obligation to bargain over initial terms commenced when new employer informed employees that they could expect to be retained without mentioning changes in preexisting terms); *C.M.E., Inc.,* 225 NLRB 514, 514–515 (1976) (obligation to bargain over initial terms commenced when new employer informed the union that it intended to rehire the predecessor's employees without mentioning changes in preexisting terms, rather than on later dates when applications for employment were solicited or when the union and the new employer met to discuss contract revisions).

[13] Contrary to the judge, we do not think that the Respondent or the employees understood the announcement of the reduction in the number of RAs to signal a material change in terms and conditions of employment. When questioned by Union President Taylor about the effect of the reduction on student/staff ratios, Gagnon gave assurances that RCs and dorm supervisors would be available to help the RAs oversee the students. (The Respondent hired 5 RCs—whose duties are nearly identical to those of RAs—and 5 dorm supervisors to work in the dorms with the RAs. Under Horizons, there were no comparable positions to RCs and dorm supervisors.) Moreover, Gagnon testified at the hearing that he did not know whether the number of students the RAs were responsible for increased after the transition, and former RA Sheila Broadnax testified that there was no change in the number of students she was responsible for after the transition.

reason, we affirm the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to continue the terms and conditions maintained by Horizons at the time of succession.

III. REFUSAL TO HIRE GENESTHER TAYLOR

A. Factual Background

The judge found, and we agree for the reasons she stated, that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire five incumbent RAs, including Union President Genesther Taylor, in order to avoid a bargaining obligation. The General Counsel excepts to the judge's failure to pass upon his alternative theory, as alleged in the complaint, that the Respondent refused to hire Taylor because of her union activity. We find merit to this exception.

Taylor was employed by Horizons from 2008 until the Respondent took over operation of the Center on March 11, 2014. As discussed, at the initial meeting between the Respondent and the Horizons employees on February 13, Taylor introduced herself as the Union president, asked several questions about the hiring process, and requested copies of job descriptions. The following morning, Taylor visited the transition office at the Center to turn in her completed employment application. While Taylor was in the transition office, she asked to speak to Gagnon. When Gagnon appeared, Taylor again requested copies of the job descriptions. She also attempted to ask Gagnon additional questions about the transition. Gagnon stated that he was not able to provide her with the job descriptions or answer any of her questions, and he instructed her to contact Adams' General Counsel Tiffany Pagni. Taylor also asked Adams' Deputy Director Kelly McGillis for a blank employment application for a Horizons RA who was in the hospital on medical leave. McGillis referred Taylor to Adams' Executive Director for Human Resources Valerie Weldon. On February 25 or 26, Taylor returned to the transition office and turned in the completed application for the RA on medical leave.

On February 27, McGillis completed and signed a form entitled "Justification for Disqualification of Potential Employment," which provides, in relevant part: "Genesther Taylor is not eligible and/or qualified [for] an offer of employment with Adams and Associates, Inc., . . . for the following reasons: Adams has reason to believe, based upon written credible information from a knowledgeable source, that this employee's job performance while working on the current contract has been unsuitable." McGillis testified that, in completing the form, she relied on information provided by Horizons' former Residential Manager Lee Bowman, whom Adams had hired as its Center Shift Manager, that Taylor "doesn't get much done." The record reflects that similar disqualification forms were completed for 14 of the approximately 76 incumbent applicants, including 9 incumbent RAs who had applied for RA positions.

Adams interviewed all incumbent applicants, including those who were deemed disqualified for an offer of employment. Adams documented each interview with an interview evaluation form, on which the interviewer graded the applicant with a numerical score between one and four in nine categories (with a score of one being the best) and made a hiring recommendation. Based on information provided by former Horizons managers and feedback from the interviewers, McGillis made the initial hiring recommendations for RA positions, and Gagnon made the final hiring decisions.

Taylor was interviewed on February 28 by McGillis, who recommended that Taylor not be hired. Taylor's interview evaluation form reflects that McGillis initially gave Taylor a score of one, or "excellent," in two categories (skills and education and technical ability); two, or "average," in six categories (relevant experience, accomplishments, job knowledge, leadership, communication skills and interpersonal skills); and three, or "below average," in one category (appearance). Sometime after the interview, McGillis revised Taylor's interview evaluation form by changing the twos to threes in four categories (accomplishments, job knowledge, leadership, and interpersonal skills). McGillis testified that she downgraded Taylor because "I realized I had scored her much higher than she deserved." On cross-examination, McGillis elaborated that she downgraded Taylor based on "all the cumulative information" she had, including Taylor's performance during her interview, information she had about the other candidates she had interviewed, and Taylor's visits to the transition office when she was performing her duties as Union president, which McGillis characterized as "very disruptive."

On March 3, Gagnon summarized in writing his reasons for not extending an offer of employment to Taylor, as follows: "she does not get her assigned work completed on her shift, had difficulty in dealing with staff who were not RAs and was looking for reasons to complain." The statement "does not get her assigned work completed" relates to Bowman's alleged comment that Taylor "doesn't get much done." However, apart from Taylor's union activities, Gagnon struggled in his testimony to explain the basis for his comments that Taylor "had difficulty in dealing with staff who were not RAs and was looking for reasons to complain." Significantly, Gagnon testified that he decided not to hire Taylor based, in part, on "my interactions with her" and "my observations of

her interactions" with others, which Gagnon described as "rude" and "unprofessional." It is undisputed that all of Gagnon's interactions with Taylor, and Taylor's interactions with others that were observed by Gagnon, took place while Taylor was acting in her capacity as Union president, questioning him about the transition and its effects on unit employees, requesting copies of job descriptions, and requesting an employment application for an RA who was on medical leave.

B. Analysis

In cases involving 8(a)(3) allegations that turn on the employer's motivation, the Board applies the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under that analysis, the General Counsel must prove that an employee's union or other protected activity was a motivating factor in the employer's action against the employee. The elements required to support such a showing are union or protected concerted activity, employer knowledge of that activity, and union animus on the part of the employer. See, e.g., *Consolidated Bus Transit,* 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). Once the General Counsel makes this initial showing, the burden of persuasion shifts to the employer to prove as an affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. *Manno Electric*, 321 NLRB 278, 283 fn. 12 (1996), enfd. mem. 127 F.3d 34 (5th Cir. 1997).

In this case, the General Counsel met his initial burden of showing that antiunion motivation played a part in the Respondent's decision not to hire Taylor. There is no dispute that Taylor was engaged in union activity protected by Section 7 of the Act when she questioned Gagnon about the transition, requested job descriptions, and requested an application for a unit employee who was on medical leave.[14] And the testimony of the Respondent's own witnesses establish that its refusal to hire Taylor was motivated, in part, by particular animus toward her diligent pursuit of her duties as Union president.[15]

Although McGillis and Gagnon advanced several other reasons for not extending an offer of employment to Taylor, i.e., Taylor's alleged poor performance during the interview and Bowman's comment that she "doesn't get much done," the judge rejected those reasons based on her credibility determinations and found that Adams' reliance on those factors was pretextual. Thus, the judge did not credit McGillis' version of Taylor's interview, in which Taylor allegedly stated that she found superintending 23 students on the graveyard shift to be "harrowing," that she had trouble finishing her room checks in the morning, and that she had proposed, but failed to follow through on, a murder-mystery program. Nor did the judge credit Bowman's statement that Taylor "doesn't get much done," finding her testimony "incredible" and that she showed "a pronounced lack of interest in providing truthful testimony." In sum, the judge found, based on her credibility determinations, that all of the Respondent's proffered nondiscriminatory reasons for refusing to hire Taylor were "patently pretextual." The Respondent has provided no compelling reason to overturn these credibility determinations, and we affirm them.

It is well established that where an administrative law judge has evaluated the employer's explanation for its action and concluded that the reasons advanced by the employer were pretextual, that determination constitutes a finding that the reasons advanced by the employer either did not exist or were not in fact relied upon. In these circumstances, the employer fails by definition to show it would have taken the same action in the absence of the protected conduct and its *Wright Line* defense necessarily fails. *Libertyville Toyota*, 360 NLRB 1298, 1301 (2014), enfd. sub. nom. *AutoNation, Inc. v. NLRB*, 801 F.3d 767 (7th Cir. 2015); *Metropolitan Transportation Services, Inc.,* 351 NLRB 657, 659 (2007); *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). See also *Wright Line*, supra, 251 NLRB at 1083–1084 (where an employer's "asserted justification is a sham in that the purported rule or circumstance advanced by the employer did not exist, or was not, in fact, relied upon . . . no legitimate business justification for the discipline exists [and] there is, by strict definition, no dual motive").

[14] The Respondent does not contend that Taylor's actions ever crossed the line from protected to nonprotected under *Atlantic Steel Co.*, 245 NLRB 814 (1979).

[15] We find additional evidence of antiunion animus in: (1) the communications from Adams' Owner and President Roy Adams to Weldon, Pagni, and others expressing his displeasure that the Respondent had incurred a bargaining obligation by hiring incumbent RAs as a majority of its new RA workforce; (2) the March 27 email from Pagni to Weldon, sent at the direction of Roy Adams after the Respondent had incurred a bargaining obligation, pointing out that there were "ample incumbent [non-unit] Sub RA's" who "could have been used to fill RA positions without acknowledging the union," and emphasizing that "Roy [Adams] raised this issue repeatedly"; and (3) the April 25 Final Written Warning that the Respondent issued to Weldon based on her performance during the transition, stating that she needed improvement in the areas of "union avoidance activities" and "where there is union involvement . . . supervision and direction of hiring activities." Finally, we infer animus from the pretextual rationale offered by the Respondent for its refusal to hire Taylor. As discussed below, the judge found that all of the Respondent's proffered reasons for its action, apart from Taylor's protected union activity, were "patently pretextual."

Accordingly, we find that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Taylor because of her union activity, as well as to avoid a bargaining obligation.

AMENDED CONCLUSIONS OF LAW

1. Adams & Associates, Inc. and McConnell, Jones, Lanier & Murphy, LLP are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. At all material times, Adams & Associates, Inc. and McConnell, Jones, Lanier & Murphy, LLP (collectively, the Respondent) have been joint employers under the Act. Each is therefore jointly and severally responsible for remedying the unfair labor practices of the other.

3. Sacramento Job Corps Federation of Teachers, AFT Local 4986, American Federation of Teachers (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

4. The following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: "All full-time Residential Advisors, Non-Residential Advisors, and Day Residential Advisors employed at the [Sacramento Jobs Corps Center]" (collectively, RAs or unit employees).

5. At all material times, the Union has been the exclusive representative of the employees in the above-described appropriate unit, for the purposes of collective bargaining with respect to wages, rates of pay, hours of employment, and other terms and conditions of employment.

6. Since February 13, 2014, the Respondent has been a "perfectly clear" successor to Horizons Youth Services, LLC, and was obligated to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees within the meaning of Section 9(a) of the Act.

7. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act by:

(a) refusing to hire Shannon Cousins-Kamara, Macord Nguyen, Genesther Taylor, and Azaria Ting, and rescinding an offer to hire Andre Lang, in an attempt to avoid the obligation to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees; and

(b) refusing to hire Union President Genesther Taylor because of her union activities.

8. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by:

(a) announcing and implementing unilateral changes in the unit employees' existing terms and conditions of employment on and after March 11, 2014, including ceasing to give effect to the progressive disciplinary, just cause, and grievance provisions of Horizons' most recent collective-bargaining agreement with the Union; implementing new disciplinary policies and procedures, at-will employment, and a mandatory arbitration policy for employment-related disputes; modifying the terms of the existing probationary period; eliminating existing health benefits; and changing from a fixed shift schedule to a rotating shift schedule for some RAs;

(b) unilaterally transferring bargaining unit work outside of the collective-bargaining unit, by assigning RA work to the functionally equivalent position of residential coordinator (RC); and

(c) enforcing its access rule against Union president Genesther Taylor, who sought entry to the Sacramento Job Corps Center for purposes of collective bargaining.

9. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

10. The Respondent has not otherwise violated the Act as alleged in the complaint.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent discriminatorily refused to hire Shannon Cousins-Kamara, Macord Nguyen, Genesther Taylor, and Azaria Ting, and discriminatorily rescinded Andre Lang's offer of employment, we shall order the Respondent to offer to these employees instatement in the positions for which they would have been hired, absent the Respondent's unlawful discrimination, or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority and other rights and privileges enjoyed, discharging if necessary any employees hired in their place. The employees listed above shall be made whole for any loss of earnings they may have suffered due to the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). The Respondent shall also be required to expunge from its files any reference to the unlawful refusals to hire the employees listed above and the unlawful rescission of the offer to hire Andre Lang, and to notify the discriminatees in writing that this has been done.

In addition, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing terms and conditions of employment for the unit em-

ployees, including ceasing to give effect to the progressive disciplinary, just cause, and grievance provisions of Horizons' most recent collective-bargaining agreement with the Union; implementing new disciplinary policies and procedures, at-will employment, and a mandatory arbitration policy for employment-related disputes; modifying the terms of the existing probationary period; eliminating existing health benefits; and changing from a fixed shift schedule to a rotating shift schedule for some RAs, we shall order the Respondent, on request of the Union, to retroactively restore the terms and conditions of employment established in the most recent collective-bargaining agreement between the Union and predecessor Horizons, and to rescind the unilateral changes it has made, until such time as the Respondent and the Union reach an agreement for a new collective-bargaining agreement or a lawful impasse based on good-faith negotiations.[16] The Respondent shall also be required to make whole the unit employees for any loss of wages or other benefits they suffered as a result of the unilateral changes in the manner set forth in *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River*, supra. With respect to the Respondent's unilateral termination of the unit employees' preexisting health care benefits, we shall order the Respondent to restore, upon request of the Union, the preexisting health care benefits and reimburse the unit employees for any expenses ensuing from the Respondent's failure to continue the preexisting health care coverage, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection,* supra, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River*, supra.

In addition, we shall order the Respondent to offer Sheila Broadnax, Bienvenida Viloria, Rolando Aspiras, and Vicente Moran full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any employees hired in their place. The employees listed above shall be made whole for any loss of earnings they may have suffered due to the unlawful discharges. Backpay shall be computed in accordance with *F. W. Woolworth*, supra, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River*, supra. The Respondent shall also be required to expunge from its files any reference to the unlawful discharges and to notify the discriminatees in writing that this has been done. However, the Respondent is entitled to show, at compliance, that it would have discharged the employees under the preexisting terms and conditions, avoiding as to those employees any reinstatement, expunction, and backpay obligation.[17]

To remedy the Respondent's unilateral transfer of unit work outside the collective-bargaining unit, we shall order the Respondent to rescind the transfer of the work; recognize the Union as the exclusive collective-bargaining representative of employees occupying the Residential Coordinator position; and, upon request, bargain with the Union regarding those employees' wages, hours, and other terms and conditions of employment. However, nothing herein shall be construed to authorize or require the withdrawal or elimination of any wage increase or other improved benefits or terms or conditions of employment, which may have been afforded to the Residential Coordinator employees, as compared to the wages, benefits, and terms or conditions of employment of bargaining unit employees.

Although it does not appear from the record herein that any employees suffered any economic loss as a consequence of the Respondent's unilateral transfer of unit work, we shall nevertheless order it to make whole any employees who are shown to have suffered any loss of wages or benefits as a result of the unlawful actions, in the manner set forth in *Ogle Protection,* supra, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River,* supra.

Finally, the Respondent shall be required to compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the back-

[16] *Pressroom Cleaners*, 361 NLRB 643 (2014), motion for reconsideration denied 361 NLRB 1166 (2014).

The Order shall not be construed as requiring or authorizing the Respondent to rescind any improvements in the unit employees' terms and conditions of employment unless requested to do so by the Union.

[17] See *Pacific Beach Hotel,* 356 NLRB 1392, 1400 (2011); *Uniserv*, 351 NLRB 1361, 1361 fn. 1 (2007); *Allied Aviation Fueling of Dallas, LP*, 347 NLRB 248, 248 fn. 2 (2006), enfd. 490 F.3d 374 (5th Cir. 2007).

Because the Respondent will have the opportunity at compliance to show that it would have discharged or disciplined the above-named employees even absent the unilateral changes, the Order and notice shall not include the requirement that the reinstatement offers or expunction be completed "within 14 days of the date of the Board's Order." *Allied Aviation*, supra, 347 NLRB at 248 fn. 3. We note, however, that such a showing would not change our finding of the underlying violation.

pay awards to the appropriate calendar years for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016).

ORDER

The National Labor Relations Board orders that the Respondent, Adams & Associates, Inc., Sacramento, California, its officers, agents, successors, and assigns, and joint employer McConnell, Jones, Lanier & Murphy, Sacramento, California, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Refusing to hire, and rescinding offers to hire, employees of predecessor Horizons Youth Services, LLC, in an attempt to avoid the obligation to recognize and bargain with Sacramento Job Corps Federation of Teachers, AFT Local 4986, American Federation of Teachers (the Union) as the exclusive collective-bargaining representative of employees in the following appropriate unit: "All Full-time Residential Advisors, Non-Residential Advisors, and Day Residential Advisors employed at the Sacramento Job Corps Center."

(b) Discharging or otherwise discriminating against employees for supporting the Union or any other labor organization.

(c) Unilaterally changing the terms and conditions of employment of the unit employees, including but not limited to ceasing to give effect to the progressive disciplinary, just cause, and grievance provisions of the most recent collective-bargaining agreement between Horizon and the Union; modifying the terms of the probationary period for unit employees; eliminating health benefits; and modifying schedules, without providing the Union with notice and an opportunity to bargain.

(d) Unilaterally transferring bargaining unit work outside the bargaining unit, without prior notice to the Union and without affording the Union notice and an opportunity to bargain with respect to this conduct.

(e) Failing and refusing to recognize the Union as the exclusive collective-bargaining representative of employees occupying the position of Residential Coordinator.

(f) Enforcing access rules against Genesther Taylor, who sought entry to the Center for purposes of bargaining with Adams.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Shannon Cousins-Kamara, Macord Nguyen, Genesther Taylor, Azaria Ting, and Andre Lang employment in their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any employees hired in their place.

(b) Make Shannon Cousins-Kamara, Macord Nguyen, Genesther Taylor, Azaria Ting, and Andre Lang whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusals to hire Shannon Cousins-Kamara, Macord Nguyen, Genesther Taylor, and Azaria Ting, and the unlawful rescission of the offer to hire Andre Lang, and within 3 days thereafter, notify the employees in writing that this has been done and that the refusal to hire or rescinding of the offer will not be used against them in any way.

(d) On request by the Union, rescind the changes in the terms and conditions of employment for the unit employees that were unilaterally implemented on and after March 11, 2014, and restore the status quo ante until such time as the Respondent and the Union reach an agreement for a new collective-bargaining agreement or a lawful impasse based on good-faith negotiations.

(e) Make the unit employees whole, with interest, for any losses sustained as a result of the unilateral changes in terms and conditions of employment in the manner set forth in the remedy section of this decision.

(f) Offer Sheila Broadnax, Rolando Aspiras, Bienvenida Viloria, and Vicente Moran full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, unless it is shown that the Respondent would have discharged those employees under the preexisting terms and conditions of employment.

(g) Make Sheila Broadnax, Rolando Aspiras, Bienvenida Viloria, and Vicente Moran whole for any loss of earnings and other benefits suffered as a result of the discharges, in the manner set forth in the remedy section of this decision, unless it is shown that the Respondent would have discharged those employees under the preexisting terms and conditions of employment.

(h) Remove from its files any reference to the discharges of Sheila Broadnax, Rolando Aspiras, Bienvenida Viloria, and Vicente Moran, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way, unless it is shown that the Respondent would have discharged those employees under the preexisting terms and conditions of employment.

(i) Rescind the transfer of bargaining unit work outside the collective-bargaining unit.

(j) Recognize the Union as the exclusive collective-bargaining representative of the employees occupying the Residential Coordinator position and, upon request, bargain with the Union regarding those employees' wages, hours, and other terms and conditions of employment.

(k) Make employees occupying the Residential Coordinator position whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful actions, in the manner set forth in the remedy section of this decision.

(l) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(m) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(n) Allow Union President Genesther Taylor access to the Sacramento Job Corps Youth Training Center for purposes of union and collective-bargaining activity.

(o) Within 14 days after service by the Region, post at its facility in Sacramento, California, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representatives, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 13, 2014.

(p) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to hire you or rescind your offer of employment because of your prior union-represented employment with Horizons Youth Services, LLC, or otherwise discriminate against you to avoid having to recognize and bargain with Sacramento Job Corps Federation of Teachers, AFT, Local 4986, American Federation of Teachers (the Union) as the exclusive bargaining representative of "All full-time Residential Advisors, Non-Residential Advisors, and Day Residential Advisors employed at the Sacramento Job Corps Center" (the unit).

WE WILL NOT discharge or otherwise discriminate against you for supporting the Union or any other labor organization.

WE WILL NOT change the terms and conditions of employment of our unit employees without first notifying the Union and giving it an opportunity to bargain, including by unilaterally ceasing to give effect to the progressive disciplinary, just cause, and grievance provisions of the most recent collective-bargaining agreement between Horizons Youth Services and the Union; implementing new disciplinary policies and procedures and a mandatory arbitration policy; modifying the terms of the proba-

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

tionary period; eliminating health benefits; and changing from a fixed shift schedule.

WE WILL NOT transfer bargaining unit work outside the collective-bargaining unit, without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT fail and refuse to recognize the Union as the exclusive collective-bargaining representative of our employees who are performing bargaining unit work, including Residential Coordinators.

WE WILL NOT enforce an access rule against Union President Genesther Taylor who sought access to the Center for purposes of collective bargaining.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer employment to the following former unit employees of the predecessor, Horizons Youth Services, who would have been employed by us but for the unlawful discrimination against them, in their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any employees hired in their places.

Shannon Cousins-Kamara
Macord Nguyen
Genesther Taylor
Azaria Ting
Andre Lang

WE WILL make the above-named employees whole for any loss of earnings and other benefits suffered as a result of our unlawful refusal to hire them, less any net interim earnings, plus interest compounded daily.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful refusal to hire or unlawful rescission of an offer to hire regarding the above-named employees, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that our unlawful refusal to hire or unlawful rescission of an offer to hire them will not be used against them in any way.

WE WILL, on request by the Union, rescind the changes in the terms and conditions of employment of our unit employees that we unilaterally implemented on and after March 11, 2014, and retroactively restore the preexisting terms and conditions of employment as set forth in the most recent collective-bargaining agreement between Horizons Youth Services and the Union, until we have reached an agreement with the Union for a new collective-bargaining agreement or a lawful impasse based on good-faith negotiations.

WE WILL make the unit employees whole for any losses sustained as a result of the unilateral changes in terms and conditions of employment, plus interest compounded daily.

WE WILL offer the following unit employees who were discharged pursuant to our unilaterally implemented disciplinary policies and procedures, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any employees hired in their places, subject to our demonstrating in a compliance hearing that we would have discharged the employees even under the terms and conditions of employment that existed immediately prior to the takeover of predecessor Horizons Youth Services' operation.

Sheila Broadnax
Rolando Aspiras
Bienvenida Viloria
Vicente Moran

WE WILL, subject to the condition set forth above, make the-above named employees whole for any loss of earnings and other benefits suffered as a result of the discharges, less any net interim earnings, plus interest compounded daily.

WE WILL, subject to the condition set forth above, remove from our files any reference to the unlawful discharges of the above-named employees, and WE WILL, within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL rescind our transfer of bargaining unit work outside the collective-bargaining unit.

WE WILL notify and, upon request, bargain with the Union in good faith before transferring any work outside the collective-bargaining unit.

WE WILL recognize the Union as the exclusive collective-bargaining representative of employees occupying the position of Residential Coordinator and, upon request, bargain with the Union regarding those employees' wages, hours, and other terms and conditions of employment.

WE WILL make whole employees who have occupied the position of Residential Coordinator for any loss of earnings and other benefits suffered as a result of our unlawful actions, with interest, compounded daily.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Di-

rector for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL allow Union President Genesther Taylor access to the Sacramento Job Corps Center for purposes of union and collective-bargaining activity.

ADAMS & ASSOCIATES, INC. AND MCCONNELL, JONES, LANIER & MURPHY, LLP

The Board's decision can be found at www.nlrb.gov/case/20-CA-130613 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Joseph D. Richardson, Esq., and *David Reeves, Esq.*, for the General Counsel.

Hope J. Singer, Esq., for the Charging Party.

Matthew J. Ruggles, Esq., and *Michael G.Pidhirney, Esq.*, for Respondent Adams & Associates, Inc.

Mickey L. Washington, Esq., for Respondent McConnell, Jones, Lanier & Murphy, LLP.

DECISION

MARY MILLER CRACRAFT, Administrative Law Judge. The General Counsel alleges that Respondent Adams & Associates, Inc. (Adams) is a successor to the bargaining obligation between Charging Party Sacramento Job Corps Federation of Teachers, AFT Local 4986, American Federation of Teachers (the Union) and predecessor Horizons Youth Services, LLC (Horizons).[1] The General Counsel also asserts that Adams refused to hire five[2] Horizons employees in order to avoid a successor obligation or, alternatively, refused to hire one Horizons employee because of her Union activity. Further, the General Counsel alleges that Adams discharged four employees without prior notice to the Union or opportunity to bargain in violation of *Alan Ritchey,* 359 NLRB 396 (2012); made unilateral changes in terms and conditions of employment; barred a Union representative from the premises; and refused to bargain with the Union by refusing to meet at reasonable times and places. Alleging that Respondent McConnell, Jones, Lanier & Murphy, LLP (MJLM) and Adams (jointly Respondents) are joint employers, the General Counsel seeks Respondents' joint and several liability for remedying the alleged violations.

Hearing was held in Sacramento, California on January 26–30 and February 4–5, 2015. On the entire record, including my observation of the demeanor of the witnesses,[3] and after considering the briefs filed by counsel for the General Counsel, counsel for the Union, counsel for Adams, and counsel for MJLM, the following findings of fact and conclusions of law are made.

JURISDICTION

Adams is a Nevada corporation providing management and student services at Job Corps centers both inside and outside the State of California including at the Sacramento Job Corps Center (the Center). MJLM is a Texas LLP with an office and place of business in Sacramento, California. It provides management, educational, and student services at Job Corps centers both inside and outside the State of California. Both Adams and MJLM admit that they meet the Board's jurisdictional standards for nonretail direct outflow[4] and are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act).[5]

The parties agree that the Union is a labor organization within the meaning of Section 2(5) of the Act. Thus, this dispute affects interstate commerce and the Board has jurisdiction of this case pursuant to Section 10(a) of the Act.

CORPORATE/CENTER HIERARCHY

The Job Corps program is administered by the United States Department of Labor (DOL). It provides training to economically disadvantaged 16- to 24-year-old individuals who have barriers to achieving academic or career training goals. The Job Corps program provides academic training toward a high school diploma and vocational training including career success skills. DOL contracts for administration of Job Corps facilities. Both Adams and MJLM have such administration contracts for various Job Corps centers throughout the United States. MJLM was awarded the Sacramento contract in early February 2014.[6]

[1] The underlying unfair labor practice charge in Case 20–CA–130613, the first amended charge and second amended charge were filed by the Union respectively on June 10, July 30, and August 11, 2014. The underlying unfair labor practice charge in Case 20–CA–138046 was filed by the Union on October 1, 2014. The complaint, first amended consolidated complaint, and second amended consolidated complaint were issued respectively on November 12, 2014, November 24, 2014, and January 6, 2015.

[2] The second amended consolidated complaint was amended at the hearing to increase the number of alleged unlawful refusals to hire from three to five individuals. The second amended consolidated complaint as amended at hearing will be referred to as the complaint.

[3] There is little dispute with regard to the facts of this case. However, when necessary, credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

[4] *Siemons Mailing Service*, 122 NLRB 81 (1958).

[5] 29 U.S.C. §151 et seq.

[6] Unless otherwise referenced, all dates are in 2014.

Adams has about 2000 employees at 16 different Job Corps facilities. At most of these facilities, Adams contracts directly with DOL. At the Sacramento Center, however, Adams functions as a first-tier subcontractor of MJLM. Roy A. Adams is president and CEO of Adams and will be referred to as CEO Adams. Jimmy Gagnon (Gagnon) is Adams' executive director, Valerie Weldon (Weldon), was executive director of human resources at all relevant times, and Kelly McGillis (McGillis) is deputy center director, the highest ranking Adams' representative at the Center. McGillis reports to MJLM's Center director, Erica Evans (Evans). Adams' Center shift managers are Lee Bowman (Bowman) and Eric Cordero (Cordero). These individuals are admitted supervisors and/or agents of Adams within the meaning of Section 2(11) and 2(13) of the Act. Tiffany Pagni (Pagni) is General Counsel and vice president of human resources for Adams.

MJLM has overall responsibility for management of the Center. It directly handles education and training, maintenance, finance, and administration. MJLM personnel in Sacramento are Evans, the Center director, and Sharon E. Murphy (Murphy), Partner. Both Adams and MJLM deny that these individuals are supervisors or agents within the meaning of the Act. Murphy signed the subcontract agreement between MJLM and Adams and was the highest ranking MJLM individual on site during the transition. Evans was the former Center director for Horizons and was hired by MJLM to fill that same position for them. After she was hired by MJLM, she, along with Murphy, interviewed applicants during the transition period and recommended hiring. I find that both Evans and Murphy were meaningfully involved in recommending hire and therefore find that they are supervisors within the meaning of Section 2(11) of the Act. I further find substantial evidence on the record that Murphy is an agent of MJLM within the meaning of Section 2(13) of the Act.[7]

COLLECTIVE-BARGAINING RELATIONSHIP

From roughly 2009 through March 11, 2014, Horizons operated the Center pursuant to a contract with DOL. However, on or about February 7, DOL awarded the contract to operate the Center to MJLM and on March 11, MJLM together with its first-tier subcontractor Adams, began operating the Center. Adams was responsible for residential, counseling, career preparation, career transition, recreation, and wellness services. At the time of takeover, there were approximately 372 students enrolled in the Sacramento program. Most of these students were housed in Center dormitories and were overseen in the dormitories by Residential Advisors (RAs).

Horizons and the Union had a collective-bargaining relationship. Their most recent collective-bargaining agreement was effective by its terms from September 1, 2010, until June 30, 2013. It was extended three times thereafter through March 9, 2014. The Union was the exclusive collective-bargaining representative within the meaning of Section 9(a)[8] of the Act for "All full-time Residential Advisors, Non-Residential Advisors, and Day Residential Advisors employed at the [Center]," an appropriate unit within the meaning of Section 9(b)[9] of the Act. In March 2014, Horizons employed 26 bargaining unit employees including 24 RAs, one non-residential advisor and one day residential advisor.[10] These three bargaining unit positions will be referred to collectively as "RAs."

Under Horizons' administration, the RAs were responsible for about 23–34 students in one wing of each dormitory. Prior to beginning its operations, Adams announced its intention to hire only 15 RAs and to increase the number of students per RA. Horizons employed about 25 RAs. Adams also announced it would hire five Residential Coordinators (RCs), a position not utilized by Horizons. RCs have roughly the same job duties as RAs but in addition to those duties, they fill in for the dormitory supervisors and center shift manager when necessary. Adams considers RCs an entry-level management position. Adams utilizes this position at its other centers throughout the United States.

HIRING

During the transition period, all hiring was completed including RAs and RCs. Ultimately, Adams hired 9 of its 15 RAs from the Horizons bargaining unit. Nevertheless, the General Counsel claims that five former Horizons RAs were not hired due to Adams' plan to avoid successorship by refusing to hire its predecessor's unit employees.

General Hiring Contours

Adams operates roughly 16 Job Corps Centers as the prime

[7] Sec. 2(13) of the Act, 29 U.S.C. § 152(13), provides that, "In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." In determining whether a person acts as an agent of another, the Board applies the common-law principles of agency. *Dr. Rico Perez Products*, 353 NLRB 453, 463 (2008). Under the common-law rules of agency, an agency relationship can be established by vesting an agent with actual or apparent authority. Actual authority is "created by a principal's manifestation to an agent that, as reasonably understood by the agent, expresses the principal's assent that the agent takes action on the principal's behalf." *Restatement (Third) of Agency,* Section 3.01 "Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." *Restatement (Third) of Agency,* Section 2.03. Certainly, by signing the subcontract with Adams, Murphy was at a minimum an apparent agent of MJLM.

[8] Sec. 9(a) of the Act, 29 U.S.C. § 159(a), provides, inter alia, that "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . ."

[9] Sec. 9(b) of the Act, 29 U.S.C. § 159(b), provides that, "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . ."

[10] These numbers are taken from a Horizons list provided to MJLM. RAs staff Center dormitories 24 hours a day, 7 days a week working on day shift, swing shift, or graveyard shift. About 25 unit members were RAs. One "non-residential advisor" works with students who are not housed at Center dormitories. One "day residential advisor" works from 6 a.m. to 3:30 p.m. and performs inspections of the dormitories.

contractor. The Sacramento Job Corps Center was Adams' first experience as a subcontractor to the prime contractor. The period from award to commencing operation, the transition period, was truncated in Sacramento due to a contract appeal filed either by Horizons or a Horizons' subcontractor, Insights. Typically, there is a 30-day transition period between contractors. In this case, the actual transition period began around February 13 but was blocked by the appeal on or about February 15. Adams and MJLM packed their transition materials and equipment and sent them to storage. Adams and MJLM returned following the appeal and completed the transition from February 24 to March 10.

Typically, the new contractor is not given access to the old contractor's personnel records and this was the case in Sacramento. Although Horizons did not turn over its personnel records to MJLM, Horizons provided MJLM a list of all its current employees ("Horizons List") with their job titles, hire dates, and seniority dates. MJLM shared the Horizons List with Adams. Consistent with its past practice in other transitions, in filling positions at Sacramento, Adams' strategy was to fill management positions first.

In filling RA positions, Adams was required to follow Executive Order 13495 Non-Displacement of Qualified Workers under Service Contracts (referred to here as the EO). The EO implementing regulations went into effect in 2013 and incorporated a right of first refusal for displaced employees requiring successor contractors and subcontractors to offer employment to predecessor contractor "qualified" employees. The regulations also required that offers of employment be issued no later than 10 days prior to the contractor taking over the operations. That is, Adams was required to offer qualified Horizons RAs positions no later than March 1.

Adams provided Horizons employees with a Notice to Service Contract Employees which provided, in part:

> Adams will offer a first right of refusal for employment to those ***eligible and qualified*** employees who worked on the Horizons contract during the last 30 days of that contract [with certain exceptions including]
>
> - Adams may reduce the size of the current workforce; therefore, only a portion of the existing eligible workforce may receive employment offers. However, Adams will offer positions to the displaced employees (for which they are qualified) if any openings occur during the first 90 days of performance on the new contract.
> - Where Adams has reason to believe that an employee's job performance while working on the current contract has been unsuitable, the employee is not entitled to an offer of employment on the new contract.

Thus, Adams first interviewed qualified incumbent employees, that is, employees of Horizons, the contractor losing the contract. These qualified incumbents were given the right to apply for positions before outside applicants were considered. Adams interviewed them and if they were "qualified," offered them a position. For unfilled spots, Adams recruited from the outside.

As far as setting interview times, incumbent applicants could come into the Center transition office and sign the list at the front desk for an interview time. The transition team double checked the interview schedule to make sure all incumbent applicants were scheduled for an interview in order to issue job offers within the transition timeframe of 10 days prior to commencement of operations or March 1. If incumbent applicants did not sign up for an interview, they were contacted by the transition team to set up an interview time.

Residential Advisor Hiring

FACTS

At the end of each day, the interviewers met with Weldon and Gagnon. Gagnon made the final decision on which applicants to hire. The decisions to hire were made on an ongoing basis throughout the transition period. Gagnon testified that he used a variety of information in determining which incumbent employees to hire including completed interview evaluation forms, an annotated Horizons List, and disqualification forms (which were sometimes completed in advance of interviews). Finally, Gagnon was under corporate instruction throughout the hiring process and these instructions impacted hiring as well.

Interview Evaluation Forms

Applications and resumes were placed in bins by job. All RA applications were placed in a single bin and all RC applications in another bin. Subject matter specialists, who were conducting interviews, went through these bins and determined which applicants to interview. With regard to RA and RC applicants, these experts were Antoinette Holman (Holman), a manager from the Maryland corporate office; Babette Connor (Connor), career preparation manager from the Adams Treasure Island Job Corps Center; and McGillis. All incumbent applicants were interviewed.

Interview evaluation forms were completed by each interviewer in nine categories: skills, education, etc.; relevant experience; accomplishments; technical ability; job knowledge; appearance; leadership; communication skills; and interpersonal skills. Interviewers rated each applicant on a scale of one to four with one being excellent; two, average; three, below average; and four, unsatisfactory. Thus, an overall evaluation score of 9 would indicate an excellent candidate in every category and an overall evaluation score of 36 would indicate an unsatisfactory candidate in every category.

The Horizons Lists

As soon as Adams hired its management staff, they discussed the Horizons List with these future managers to obtain insight into which incumbent employees the future managers thought should be hired. Specifically, as relates to RA hiring, newly-hired center shift manager Bowman (a former Horizons' dorm supervisor and later dorm manager with four dorm supervisors reporting to her) spoke with McGillis on February 27 about RA and RC incumbent applicants.[11]

[11] Gagnon spoke with Joe Pearson about non-RA employees on the Horizons List and annotated particular employees with Pearson's feedback. Gagnon signed this annotated Horizons List on February 26, the date he spoke to Pearson. Newly hired Center director Evans was inter-

Based on Bowman's information, the Horizons List was annotated by Bowman and McGillis (Horizons List I). That is, according to McGillis, Bowman placed dots by the names of incumbent applicants she did not recommend hiring and asterisks or stars by those she did recommend hiring. McGillis took notes on the list indicating what Bowman said about various incumbent applicants.

Horizons List I no longer existed at the time of trial. There is no dispute that Horizons List I was copied with the dots and stars or asterisks of Bowman but McGillis' annotations of Bowman's comments were deleted. The stated purpose of copying Horizons List I without McGillis' annotations was to eliminate an "inappropriate" ADA[12] remark that did not relate to an RA or RC applicant. The original handwritten notes were McGillis' but when the document was recreated (Horizons List II) Gagnon wrote McGillis' remarks. McGillis signed Horizons List II using the original date of signing. Regarding the five alleged discriminatees, Horizons List II states as follows:

Name	Hire Date	Start Date	Annotation
Cousins-Kamara, Shannon	12/27/10	12/27/10	integrity issue
Lang, Andre	08/16/11	08/16/11	no annotation
Nguyen, Macord	07/01/08	03/29/04	sleeps + steels [sic]
Taylor, Genesther	08/18/08	08/18/08	Doesn't get much done
Ting, Azaria	09/25/12	09/25/12	Not good at doing job

Disqualification Forms

Although many of the individuals about whom Bowman gave negative information had not yet been interviewed, McGillis nevertheless completed "Justification for Disqualification of Potential Employment" (disqualification forms) for them on February 27. Based on Bowman's information, McGillis marked each of the five alleged discriminatees' forms with an "X" for, "Adams has reason to believe, based upon written credible information from a knowledgeable source, that this employee's job performance while working on the current contract has been unsuitable."

RA applicants for whom the forms were completed included the five alleged discriminatees as well as four individuals who were ultimately hired as RAs. According to McGillis, her completion of this form was just one piece of information but did not automatically disqualify individuals from being hired. Gagnon had the completed disqualification forms in front of him when he made the decisions to hire or not to hire. The five alleged discriminatees' application and interview process was conducted within these general contours.

Corporate Hiring Instruction

The record indicates that a corporate successorship avoidance plan formed the overarching basis for hiring. Although CEO Adams wanted to avoid successor status, his team failed him and ultimately Horizons RAs made up a majority of Adams' RAs. CEO Adams disciplined his team for their failure. Based on these facts, I find that from the beginning of the transition, the corporate plan was to avoid successor status.

In late February or early March, at a time when there were just a few more RA slots to fill, Gagnon explained that Adams was having difficulty determining whether there was sufficient information to disqualify certain incumbent applicants as RAs because they had interviewed well and had good scores. Around this time, Gagnon recalled a conversation with Weldon about whether to hire Calahan,[13] Lang,[14] Moran,[15] and/or Ostrowski[16] as RAs. Although Gagnon did not recall whether they spoke about the Union, Weldon confirmed that they did.

Weldon credibly testified that on this occasion in late February or early March, she and Gagnon went through the four applicants' folders and noted that these incumbent employees had been recommended by their interviewers for hire. She told Gagnon, "We can't not hire these employees . . . just because they are part of the Union. We have to hire them because they are—based upon our interview process they passed and they should be hired."

Ultimately Gagnon decided to hire the individuals. Sometime after the meeting, probably toward the end of the week when they had finished hiring, CEO Adams pulled Weldon aside and told her that these hires had caused Adams to incur a bargaining obligation with the Union. He stated, "[W]e screwed up. The Union was now involved and he was not happy."

On March 4, CEO Adams sent an email to Pagni, Gagnon, Weldon and others stating,

> Unfortunately, we hired the majority of the union members at Sacramento and we, therefore, must negotiate a Collective Bargaining Agreement and incur other associated union legal costs. We should capture the union associated costs incurred at Treasure Island and use a basis to revise our Sacramento budget to cover those expenses.

In late March, Weldon was sent back to Sacramento to gath-

viewed by Sharon Murphy of MJLM about various non-RA former Horizons' employees on February 26 and Murphy annotated a Horizons List to reflect Evans' comments.

[12] The Americans with Disabilities Act (ADA), 42 U.S.C. §12101 et seq. prohibits discrimination against people with disabilities in employment, among other things.

[13] Calahan was interviewed by Murphy and was given an overall score of two which is average with a recommendation to hire.

[14] Lang scored a perfect one overall evaluation from interviewer Antionette Holman. Holman recommended hiring him.

[15] Moran was interviewed by Don Khajavi (Khajavi), an MJLM consultant, who recommended hiring him and gave him an overall evaluation score of one which is the highest score and signifies excellent.

[16] Ostrowski was interviewed by Khajavi on February 27 and scored 1.5 on her overall evaluation. Khajavi recommended hiring.

er additional information for various Horizons employees who were not hired by Adams. While there, she received an email from Pagni telling her that Erica [Evans] comments were not helpful supplemental information and Evans had mentioned the union in her comments. Pagni continued, "Union involvement was not questioned or used as a [disqualify]ing factor for these individuals and cannot be used in these further supporting documents. We need to take any mention of union out." Prior to receiving this email, Weldon recalled that Pagni told her in a phone conversation or in person that the union was not to be referenced in the supplemental information.

In CEO Adams' email of March 22, "Significant Performance Concerns," however, he noted that a priority to "Within compliance guidelines, avoid union recognition" had not been achieved. He concluded, "Despite repeated direction, guidelines, forms, discussion, HR staff experience, qualifications, 10 years of union avoidance responsibility, and, quite frankly, common sense, the company HR department failed to achieve minimum performance at the Sacramento transition."

In any event, during the week of March 24, Weldon gathered additional information by interviewing former Horizons' supervisors about employees who were not hired by Adams. She completed a "Qualification Assessment" for each individual she was told needed bolstering information. She interviewed managers during that week regarding former Horizons RAs Cousins-Kamara, Azyha Jones, Nguyen, and Ting. She also completed similar information for some non-RA employees.

On March 26, Pagni sent an email to Weldon, "Quick clean-up" asking among other things that Weldon "(take out union reference in [Taylor's] statement)." Weldon responded, "Done."

On March 27, Pagni propounded a set of questions to Weldon regarding human resources performance during the transition. One set of questions along with Weldon's answers follows. In understanding the questions, it is important to note that a substitute resident advisor, "Sub RA," is not a bargaining unit position.

> Question: In preparing a recent summary of individuals who applied versus those who were hired, there are ample incumbent Sub RA's on the list. These incumbent employees could have been used to fill RA positions without acknowledging the union. Roy [Adams] raised this issue repeatedly.
> Answer: This was not raised to me.
> Question: Do you know why these individuals were passed over for [fulltime] RAs?
> Answer: We were instructed to provide everyone on the incumbent list the opportunity for an interview. As far as I know, everyone was interviewed. The decision to hire was not mine, but the people who were in charge in conjunction with the people who conducted the interviews.

On April 25, Weldon received a Final Written Warning. One of the performance concerns raised was that she had completely failed to provide union avoidance training. Weldon had never received a written warning after completing any other transitions.[17]

In an email dated March 22, owner Adams wrote to Pagni stating that he was concerned about human resources oversight failures in the Sacramento transition listing various priorities of the transition including, "Within compliance guidelines, avoid union recognition" and "Protect the company from expensive union-related costs. . . ." Pagni's email to Weldon of March 27 notes that owner Adams repeated raised the issue of why substitute RAs were not hired over fulltime RAs.

Based upon this evidence, I find that the corporate intent to avoid successor status and avoid recognition of the Union was in place from the beginning of the transition period. Hiring records were sanitized to omit mention of the Union, the Horizons List among them. Interview forms were altered and shredded and are thus unreliable. Immediately upon the hiring of four incumbent RA applicants, CEO Adams expressed his displeasure that a majority of his RA work force were former Horizons RAs. Weldon was sent back to strengthen the reasons for not hiring some of the five alleged discriminatees. Weldon was disciplined for failing to avoid Union recognition. CEO Adams voiced displeasure at his teams' failure to hire non-unit substitute RAs as is apparent from Pagni's subsequent communications with Weldon, and Weldon was disciplined for failure to avoid successor status.

Ultimate Hiring

Fourteen members of the Horizons bargaining unit applied for RA positions with Adams. Nine of them were hired as Adams RAs. These were Rolando Aspiras, Sheila Broadnax, Diane Calahan, Carmen Cole, Vicente Moran, Karine Osaki, Jill Ostrowski, Olaisa Talakai, and Bienvenida Viloria. Horizons RA Lang was also extended an offer but it was subsequently rescinded. Thus, the five alleged discriminatees were not hired as Adams RAs. Instead, former Horizons substitute RAs and one former Horizons custodian were hired for those positions.

ANALYSIS

While a successor employer is not obligated to hire its predecessor's employees, it may not discriminate against those employees on the basis of antiunion animus. *NLRB v. Burns International Security Services,* 406 U.S. 272, 280–281 (1972); see also, *U. S. Marine Corp.,* 293 NLRB 669, 670 (1989), enfd. 944 F.2d 1305 (7th Cir. 1991), cert. denied, 503 U.S. 936 (1992) (same).

In the context of successor avoidance, the General Counsel has the burden to prove that the employer failed to hire employees of its predecessor and was motivated by antiunion animus. *Planned Building Services,* 347 NLRB 670, 673 (2006) (incorporating *Wright Line*[18] and rejecting the analytical

[17] Although she did not recall any prior corrective action, Adams' files contained one from 2007 due to performance issues. This corrective action did not involve a transition effort.

[18] *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983) (In broad terms, General Counsel must prove employer's action was result of animus toward union; employer must prove it would have taken the same action in any event).

framework of *FES*[19] in the successor avoidance context).[20] Once this is shown, the burden then shifts to the employer to prove that it would not have hired the predecessor's employees even in the absence of its unlawful motive. *Planned Building Services,* supra, 347 NLRB at 674. The Board examines factors such as substantial evidence of union animus, lack of a convincing rationale for refusal to hire the predecessor's employees, inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive, and evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of the new owner's overall work force to avoid the Board's successorship doctrine. *U. S. Marine Corp.*, supra, 293 NLRB at 670.

Overwhelming evidence supports the government's allegation that Adams refused to hire former employees Cousins-Kamara, Lang, Nguyen, Taylor, and Ting in order to avoid the obligation to recognize and bargain with the Union as a successor employer. The General Counsel has satisfied its initial burden by showing substantial evidence of union animus in the corporate hiring plan, conduct specifically incorporating a discriminatory motive, i.e., Adams' anti-union plan to avoid successor status, and staffing priorities specifically established to avoid hiring a majority of its work force from its predecessor. Hence, the General Counsel has shown that Adams' hiring personnel were under orders to avoid hiring former unit employees in an effort to avoid an obligation to recognize the Union.

CEO Adams' corporate goal was to avoid Union recognition. He made this clear in his March 4 email: "Unfortunately, we hired the majority of the union members at Sacramento. . . ." and in his subsequent disciplinary action lodged against Weldon for failure, among other things, to provide union avoidance training and her lack of familiarity with the use of company forms and procedures especially where union involvement is present. Moreover, CEO Adams repeatedly stressed the need to hire non-bargaining unit substitute RAs over the bargaining unit RAs in order to avoid successor status. Although this evidence of corporate strategy post-dates the hiring, I find it clearly evinces a plan from the beginning of hiring to avoid union recognition. The fact that the anti-union corporate strategy failed does not negate the evidence of animus.

Adams' explanations for its refusal to hire the alleged discriminatees are patently pretextual. Adams struggled to provide meaningful rationale for disqualifying incumbent bargaining unit candidates Cousins-Kamara, Nguyen, Taylor and Ting, sending Weldon back for further after-the-fact evidence and instructing her to sanitize documents by deleting any reference to the Union. Instead of hiring these experienced candidates, Adams chose nonunit Horizons substitute RAs and one Horizons custodian.

Further, regarding these five candidates, at least one of their original interview forms was shredded, others were altered, and Bowman's feedback regarding them, as recorded by McGillis, was sanitized to remove reference to the Union. Further, even absent shredding, alteration, and sanitization, the purported reasons for failure to hire are pretextual.

Regarding Cousins-Kamara, who was hired by Horizons December 27, 2010 and worked on the swing shift in the Shasta dorm as an RA, McGillis recalled interviewing her on February 27. She testified that Cousins-Kamara provided a lot of information "that sounded almost too good to be true." For instance, according to McGillis, Cousins-Kamara said she was awarded a dorm of the month recognition month after month and was employee of the month. "And she really kind of went on and on about how wonderful she was in the dorm that she was assigned to perform." According to the unrebutted testimony of Andre Lang, who worked with Cousins-Kamara in the Shasta dorm, all of this information was true. And despite her avowed skepticism at the hearing, McGillis nevertheless completed an original interview evaluation form based on what Cousins-Kamara told her and then shredded it after speaking with Bowman.

McGillis admitted that she shredded this form and replaced it with a second form after speaking with former dormitory supervisor Bowman. On the second form, McGillis recommended not hiring Cousins-Kamara commenting, "Interviewer felt [Cousins-Kamara] was not forth coming when asked questions." This is obviously a false statement. McGillis actually believed Cousins-Kamara and completed an original form based on what Cousins-Kamara told her. On the second form, McGillis decided to give Cousins-Kamara an overall rating of average. There is no evidence regarding what score she gave Cousins-Kamara on the first form. Interestingly, Gagnon did not rely on McGillis' second interview form either. On March 3, in summarizing his reasons for not extending an offer to Cousins-Kamara, Gagnon relied on the Horizons List II stating that "Adams management received information from current center management that the applicant had integrity issues." Gagnon never spoke to Bowman. I find the trail of shredding and sanitization covers original positive impressions of Cousins-Kamara and an intent to hire. The papering over of original documents convinces me that Adams' reasons for not hiring Cousins-Kamara are pretextual. Thus, I find that failure to hire Cousins-Kamara was due to Adams successor avoidance plan and violated Section 8(a)(3) and (1) of the Act.

Similarly, with regard to withdrawal of the offer to Lang, there can be no doubt that his offer was withdrawn for specious reasons contrary to other applicants whose background checks showed similar disparities. Thus, Adams utilized an inconsistent policy by hiring non-unit employees with background check inconsistencies but by withdrawing its offer of employ-

[19] *FES,* 331 NLRB 9 (2000), supplementing *Wright Line* and providing an analysis for discriminatory refusal to hire or to consider for hire. *FES* requires, generally, that in addition to proving unlawful motive, the General Counsel establish that the employer was hiring and that the applicants were qualified or the qualifications were not applied or were pretextual.

[20] In *Pressroom Cleaners,* 361 NLRB 643, 648 (2014), motion for reconsideration denied, 361 NLRB 1166 (2014), the Board overruled *Planned Building Services* to the extent it allowed an employer to show in compliance that if it had bargained in good faith, it would not have agreed to the monetary provisions of its predecessor's collective-bargaining agreement. The Board returned to its prior standard requiring that the monetary portion of the remedy be measured by the predecessor's terms and conditions until the parties reach agreement or impasse, as set forth in *State Distributing Co.,* 282 NLRB 1048, 1049 (1987).

ment to Lang, who scored a perfect one in every category of the employment interview, because his dates were different than the ones provided on a background check. The dates were not necessarily incorrect but were different due to a restriction on information the reporting company could provide.

Lang worked for Horizons as on-call RA (a non-bargaining unit position) for seven months and then on August 2, 2011, he was hired full-time as an RA on the swing shift (3 p.m. to midnight). He worked with Cousins-Kamara at the Shasta dorm. According to his undisputed testimony, they won the dorm of the month award on three occasions and a dorm of the year award for 2013 as well.

On February 27, Lang achieved an excellent overall evaluation score from Holman, his interviewer, who recommended that he be offered an RA position. Lang received a one (excellent) on all nine of the criteria. Lang was offered and accepted an RA position.

Lang's offer was withdrawn after a background check revealed that the dates he provided for a former position with a temporary employment agency, April 2008 to April 2009,[21] did not match the verified dates of employment reported to the background checker: "February 6, 2013 to present (Original hire date: 2004) (note discrepancy)." The background check further stated, "We contacted this [employer] and this was all the information that they can provide. We were advised that they can only provide the original hire date and most recent dates of employment." Gagnon did not look into this matter by contacting Lang. The discrepancy in dates of employment on the background check was the only reason Lang's offer of employment was rescinded.

Other individuals who were offered employment with Adams and whose background checks showed discrepancies did not have their offers rescinded. However, none of them were prior Horizons' bargaining unit employees. For instance, successful RA applicant Siegfried Coleman's background check revealed a discrepancy between his stated dates of prior employment of October 2008 to present to the verified dates of October 2008 to January 2009. Successful RA applicant Janelle Carroll listed her dates of employment with a prior employer as January 2012 to September 2013 while the verified dates were November 2011 to September 2013. Anthony Davis' RA offer from Adams was not rescinded although he listed prior employment as "Youth Program Management" when his verified employment was "Child Care Worker." Amy Mathers' offer from Adams to be a substitute RA was not rescinded although her background check revealed prior employment from 1995 to 2009 rather than 1995 to 2008, as stated in Mathers' application. Similarly, two discrepancies in Sharytta Scroggins' employment dates did not result in her RA offer being rescinded. One discrepancy listed past employment from 2005 to 2010 and no records could be verified. The other listed past employment from 2004 to 2005 but was verified for January 2006 to February 2006.

At hearing, Gagnon explained that he had never seen these discrepancies. Other than Lang's, he recalled seeing one other residential advisor background check discrepancy and it was resolved by Weldon. In that case, he recalled the background checker could not verify a high school diploma. The applicant was contacted and brought in a copy of the diploma for verification. As to other background check discrepancies, he was unaware whether Weldon investigated them. Accepting Gagnon's explanation as true, it merely highlights the fact that prior Horizons employees were given extra scrutiny. The background check was used as a pretext to withdraw Lang's offer. From the evidence, I conclude that but for his status as a former member of the Horizons bargaining unit, Lang's offer would not have been withdrawn. Thus I find that rescinding the offer to Lang was due to Adams' successor avoidance plan and violated Section 8(a)(3) and (1) of the Act.

Nguyen worked for Sacramento Job Corps contractors since 2004. He served as union treasurer. When Gagnon interviewed Nguyen, he rated him as average or above average in every category except communication skills, giving Nguyen a below average rating and noting "hard to understand, broken English." Gagnon testified that he did not rely on his perception that Nguyen was difficult to understand when making a decision to hire or not hire Nguyen. On the interview form, Gagnon did not mark a recommendation to hire or not to hire. On March 3, Gagnon memorialized his reasons for not hiring Nguyen including, "data integrity issues" and "sleeping on the job." Gagnon could not recall what he was referring to when he mentioned "data integrity issues." However, it is obviously a reference to the Horizons List II. I find that Adams has not shown that it would not have hired Nguyen in any event. Rather, I find that Horizons rejected Nguyen's 10 years of experience in favor of hiring inexperienced nonbargaining unit substitute RAs or a custodian in order to avoid hiring a majority of its unit employees from the Horizons unit. Accordingly, I find that Adams refused to hire Nguyen as part of its successor avoidance plan in violation of Section 8(a)(3) and (1) of the Act.

Horizons employed Taylor as an RA from August 2008 through March 10, 2014. From 2009 through 2014, she worked Monday through Friday on the so-called "graveyard" shift (11:30 p.m. to 8 a.m.) Her supervisor was initially Siona Nusilla and when he left in 2012, her supervisor was Vando Tamanalevu (Tamanalevu). Taylor was responsible for the Lassen and Donner dormitories until 2013 when the Lassen dorm was closed. Thereafter, she was responsible for the Donner dormitory. Taylor estimated there were typically 23 to 34 students in each dorm.

Adams purportedly relied on interviews and feedback from Bowman in not hiring Taylor. Regarding the interview, Taylor and McGillis might as well have been at separate meetings given the disparity of their testimony about the interview. As between Taylor and McGillis, based on their relative demeanors,[22] I credit Taylor that she told McGillis that she completed

[21] The actual dates listed on Lang's application were May 2007 to January 2008 not, as stated on the background check, April 2008 to April 2009. This background check mistake did not affect the ultimate background check finding of discrepancy as under either set of facts, it was impossible to verify the dates of employment due to Lang's past employer's refusal to provide any information other than original hire date and most recent dates of employment.

[22] Taylor's testimony was straight-forward, convincing, and unflinching. McGillis' testimony was laced with examples of shredding,

a murder mystery program for the students rather than McGillis' version that Taylor said she thought about a murder mystery program but never brought it to fruition. Further, I credit Taylor that she did not tell McGillis that she had "harrowing" experiences in the dormitory. Apart from my demeanor finding above, McGillis' testimony about the murder mystery and the "harrowing" experiences is not inherently credible based on the common sense that no candidate for hiring, especially one as experienced as Taylor, would have made such statements.

Additionally, I note that McGillis admitted that she lowered Taylor's interview scores by adding an extra loop to her "2"s to make them look like "3"s based not only on the interview but also on Taylor's "rude" "unprofessional" behavior in the transition office when Taylor was pursuing Union activities.[23] Finally, Bowman's feedback, which McGillis had at the time of her interview with Taylor,[24] was that Taylor did not get much done.

On March 3, Gagnon signed a summary of the reasons he did not hire Taylor as follows: "she does not get her assigned work completed on her shift, had difficulty in dealing with staff who were not RAs and was looking for reasons to complain." It is unclear where these perceptions originated.[25] In utilizing the criteria that Taylor "was looking for reasons to complain," Taylor's activities as Union president are implicated. Further, Adams' reliance on McGillis' comment regarding Taylor's rude, unprofessional behavior while in the transition office also indicates anti-union animus.[26] Thus I find on the record as a whole that Respondent has not produced sufficient evidence to prove that it would not have hired Taylor in any event.[27] I further find that failure to hire Taylor was due to a corporate strategy to avoid successor status and violates Section 8(a)(3) and (1) of the Act.

Ting worked for Horizons as an RA since September 25, 2012. She was interviewed by Connor on February 27 for the RA position. She scored slightly below average and was not recommended for hire. Connor wrote, "Could not explain "'retention'; weakness/challenge 'not being perfect.'" Connor could not recall Ting's interview when she was questioned at the hearing and did not participate in the decision regarding employment of Ting.

Gagnon testified that he made the decision not to hire Ting based on a meeting with Evans on February 25. Evans related that Ting had an accountability issue, "not showing up for work." Gagnon also relied on Ting's interview form. Ting was interviewed by Babette Connor (Connor), the counseling manager from Adams' Treasure Island Center, on February 27. Connor's overall evaluation was below average with a recommendation not to hire. Her comment stated, "Could not explain "Retention Weakness/challenge 'not being perfect." Gagnon summarized the reasons for not hiring Ting in a memorandum of March 4 as follows: "Ms. Ting was not good at doing RA tasks. Additionally, Adams management had received additional information on 02/25/2014 that Ms. Ting had accountability issues and would not regularly show up for her scheduled work hours."

Although Adams defends its failure to hire Ting with documents and testimony which are neutral in nature, it is difficult to credit these reasons for not hiring Ting in light of the corporate policy of successor avoidance. Further, Connor could not independently recall her interview of Ting and, in any event, Gagnon testified he did not rely on the interviewer's recommendation to hire or not to hire. Due to the corporate successor strategy, I find that these reasons for failure to hire Ting cannot be credited and are pretextual. Thus, I find that Adams failed to hire Ting as part of its unsuccessful successor avoidance policy in violation of Section 8(a)(3) and (1) of the Act.

As the record on the whole amply proves, motivated by anti-union animus Adams failed to hire Cousins-Kamara, Nyugen, Taylor, and Ting and rescinded Lang's offer of employment. Adams has not shown that it would not have hired these employees and would not have rescinded Lang's offer of employment even in the absence of the unlawful motive. I find that but for Adams' unlawful animus as illustrated by its corporate scheme, Adams would have filled five vacancies with Horizons employees Cousins-Kamara, Lang, Nyugen, Taylor, and Ting.

back dating and signing forms to make them look like originals when they were actually manufactured at a later time, writing over interview forms in an attempt to cover up original impressions. Based on McGillis' friendly demeanor, these corporate mis-steps took on a surreal quality inviting one to accept these actions as an ordinary day at the office.

[23] McGillis reported for duty in Sacramento on February 25. According to McGillis, within five minutes of arriving at the Sacramento transition office, she encountered Taylor. McGillis was unloading boxes. She and others were engaged in trying to set up the transition room. Taylor was speaking in a loud voice and requested a blank Adams' application form for Gloria Franklin, a Horizons RA who was out on leave. McGillis described Taylor as "very insistent" and saying things like, "she wasn't going to wait, she wasn't going to leave, she didn't have time, those types of things."

[24] Bowman had no recollection of what feedback she provided and attempts to refresh her recollection failed. In an affidavit given to the NLRB, Bowman also stated that she had no recollection of her statements to McGillis. In a subsequent affidavit submitted by Adams in a federal court 10(j) proceeding, Bowman's recollection had improved but by the time of trial, she no longer recalled anything. All in all, Bowman's testimony was incredible and her demeanor somewhat uncooperative with a pronounced lack of interest in providing truthful testimony.

[25] Gagnon testified that his affidavit statement that he relied heavily on McGillis' interview notes from Taylor's interview in not hiring Taylor was in error. A statement in his affidavit that he also relied on a qualification assessment signed by Bowman in not hiring Taylor was in error, so he testified. His affidavit statement that he relied on another qualification assessment with the name Eric Cordero on it in not hiring Taylor was also in error according to his testimony.

[26] See, e.g., *Bruce Packing Co., Inc.,* 357 NLRB 1084, 1085 (2011) ("bad attitude" is veiled reference to protected, concerted activity); *Promenade Garage Corp.,* 314 NLRB 172, 179–180 (1994) (same).

[27] In light of my conclusion, it is unnecessary to address the General Counsel's alternate theory that Taylor was not hired due to her Union activity. Were it necessary to address, I would find, consistent with the general refusal to hire analysis, that Taylor was specifically not hired due to her Union activity. Both McGillis and Bowman made comments suggesting a negative view of Taylor's Union activity claiming she abused her position and attempted to make issues where there were none. McGillis admitted that Taylor's "inappropriate" and "demanding" behavior occurred when Taylor was engaged in Union activity. This evidence constitutes specific evidence of animus toward Taylor's Union activity.

Accordingly, I find that in refusing to hire Cousins-Kamara, Nyugen, Taylor, and Ting, and by rescinding Lang's offer of employment, Adams violated Section 8(a)(3) and (1) of the Act.

ALLEGED UNILATERAL CHANGES

FACTS

The General Counsel alleges Adams implemented "wholesale changes to the employment relationship."[28] The complaint specifically alleges[29] that Adams

- unilaterally removed work from the unit by reclassifying employees as RCs;
- unilaterally removed work by reclassifying the non-resident advisor as a non-resident counselor;
- ceased giving effect the dues deduction provision of the contract;
- cease giving effect to progressive discipline provisions of the contract;
- ceased honoring the grievance provision of the contract;
- eliminated unit health benefits;
- changed from a fixed scheduled to a rotating shift schedule for some unit employees; and
- modified the probationary period terms for unit employees.

The record reflects that all of these changes were made. Some were made prior to the hiring of employees and some were made after a full employee complement was on board. All were made prior to the March 28 recognition of the Union. It is without dispute that no notice or opportunity to bargain was afforded the Union regarding any of these changes.

ANALYSIS

In *Burns* supra, 406 U.S. at 280–281, the Court held that an employer is a "successor" to a prior employer's bargaining obligation when it maintains substantial continuity of operations and hires a majority of its own employee complement from the prior employer's unit employees. Determination of substantial continuity is based on a comparison of business operations, physical facilities, work force, jobs, working conditions, supervisors, machinery, equipment, production methods, and product. See also, *Fall River Dying Corp. v. NLRB,* 482 U.S. 27, 42–46 (1987).

There is no dispute that on March 11, the date when Adams began operating the Center, a majority of its own employee complement were bargaining unit employees from Horizons.[30] Further, Adams continued substantially identical operations using the identical physical facility, the Center, and identical equipment (all equipment belonged to the Job Corps) to that used by Horizons. Similarly, the same students remained and many Horizons' managers were retained by Adams. Adams RAs worked in the same dormitories housing the same students that were utilized by Horizons. Adams was required to perform the same services as Horizons under the same DOL requirements. I find on the record as a whole that these facts establish that Adams was a *Burns* successor to the bargaining obligation of Horizons.

On March 11, the Union demanded recognition and bargaining. Although Adams initially refused to bargain, on March 28, Adams recognized the Union as the bargaining representative for its RAs. Adams does not challenge and, in fact, concedes its successor status. What is at issue is whether Adams could make changes in terms and conditions of employment without first bargaining with the Union including changes made before March 11 when it began operating with a majority of its RAs hired from Horizons.

Before it hires a majority of its unit employees from the predecessor, a putative *Burns* successor may set initial terms and conditions of employment. *Burns,* supra, 406 U.S. at 294. Once the putative successor employer becomes an actual successor employer, it is obligated to recognize and bargain with the predecessor employees' union before changing terms and conditions of employment. *Burns,* supra, at 278–279; *Fall River Dyeing,* supra, 482 U.S. at 41.

However, the *Burns* right to set initial terms and conditions may be lost. If a successor employer unlawfully refuses to hire its predecessor's employees, it may not set initial terms and conditions of employment. *Pressroom Cleaners,* 361 NLRB 643 (2014); *Planned Building Services,* 347 NLRB 670, 674 (2006), both relying on *Love's Barbeque Restaurant No. 62,* 245 NLRB 78, 82 (1979), enfd. in relevant part sub nom. *Kallmann v. NLRB,* 640 F.2d 1094 (9th Cir. 1981) (employer who discriminately refuses to hire predecessor employees may not unilaterally set initial terms and conditions).

Further, in situations where the putative successor actually hires a majority of its predecessor's unit, if it does so utilizing an unlawful purpose, it forfeits the *Burns* right to set initial terms. This was the case in *Advanced Stretchforming International, Inc*., 323 NLRB 529 (1997), enfd in relevant part, 208 F.3d 801 (9th Cir. 2000); amended 233 F.3d 1176 (9th Cir. 2000), cert denied, 534 U.S. 948 (2001), in which the employer hired a majority of its workforce from its predecessor while

[28] It is worthy of note that the General Counsel does not allege that reducing the number of RAs from approximately 25 to 15 constituted a unilateral change. Pursuant to the General Counsel's "perfectly clear" successor theory, this change was announced prior to attachment of a bargaining obligation on March 11.

[29] General Counsel's request to withdraw paragraph 13(e) of the complaint is granted. That paragraph alleged that Adams ceased giving effect to the seniority provisions of the most recent collective bargaining agreement between Horizons and the Union without affording notice and opportunity to bargain.

[30] The record reveals only that a majority of the workforce were former employees of Horizons as of March 11, the first day of Adams' operation. Employees signed employment agreements and offer letters on various dates in late February and early March. It is possible to find dates for seven former Horizons RAs who signed either an offer letter or an employment agreement as follows: Broadnax, March 6; Calahan, March 8; Cole, February 28; Osaki, March 1; Ostrowski, March 3; Talakai, March 2; and Villoria, February 28. The remaining former Horizons RAs who were hired, Aspiras and Moran, were certainly hired by the first date of operation, March 11. Thus, I have used this date for the attachment of majority status.

telling them it would not recognize the union. The Board stated, Id. at 530:

> The fundamental premise for the forfeiture doctrine is that it would be contrary to statutory policy to "confer *Burns* rights on an employer that has not conducted itself like a lawful *Burns* successor because it has unlawfully blocked the process by which the obligations and rights of such a successor are incurred." *State Distributing Co.,* 282 NLRB 1048, 1049 (1987).

A second example of loss of the right to set initial terms and conditions of employment occurs when it is "perfectly clear" that the putative successor will hire all of its predecessor's employees. The General Counsel's brief regarding the unlawfulness of the alleged unilateral changes is not based upon the *Love's Barbeque* theory. Rather, the General Counsel asserts that Adams is a "perfectly clear" *Burns* successor and thus violated Section 8(a)(5) of the Act by setting initial terms without first bargaining with the Union. I reject this argument because I find that Adams was not a "perfectly clear" *Burns* successor as limited by *Spruce Up Corp.,* 209 NLRB 194 (1974), enfd. mem. 529 F.2d 516 (4th Cir. 1975).

As mentioned before, ordinarily, a statutory successor is not bound by the substantive terms of the predecessor's collective-bargaining agreement and, prior to hiring a majority, may set initial terms and conditions of employment. *Burns,* supra, 406 U.S. at 280–281.The Court noted that there might be exceptions in which a successor must bargain with the union before setting initial terms. Id. at 294–295. This is known as the "perfectly clear" caveat:

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit, and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. In other words, it may not be clear until the successor employer has hired a full complement of employees that he has a duty to bargain with a union since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as required by Section 9(a) of the Act, 29 U.S.C. § 159(a).

Thus the Court stated that a "perfectly clear" successor would be appropriately restricted in setting its initial terms and conditions of employment and instead must first consult with the union before fixing terms and conditions of employment. In *Spruce Up Corp.*, supra, 209 NLRB at 195, the Board "concede[d] that the precise meaning and application of the Court's ["perfectly clear"] caveat is not easy to discern." After making this observation, a majority of the Board (Chairman Miller and Member Jenkins with Member Kennedy concurring in relevant part; Members Fanning and Panello dissenting separately), limited the "perfectly clear" caveat as follows, Id. at 195:

> We believe the caveat in *Burns,* therefore, should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, [footnote omitted] or at least to circumstances where the new employer, unlike the Respondent here, has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

Adams was not a "perfectly clear" *Burns* successor as limited in *Spruce Up*. Adams did not actively or tacitly indicate that all employees would be retained. Further, even were there evidence sufficient to make such a finding, Adams indicated prior to hiring each employee that it planned to change many terms and conditions of employment.

The regulatory framework applicable to the transition from one contractor to the next did not mandate that all incumbent Horizons employees be retained by Adams. Although there is no dispute that Adams was required to offer unit employees a right of first refusal under the EO and DOL regulations, this right of first refusal did not constitute a mandated blanket offer to all employees. That is under the EO and DOL regulations, a successor contractor could refuse to offer employment to an incumbent employee when, among other reasons, it had credible information the applicant had not performed for the prior contractor suitably. Thus, the applicable regulation, 29 C.F.R. § 9.12(c)(4), provides:

> **(4)Employee's past unsuitable performance.**
> **(i)** A contractor or subcontractor is not required to offer employment to any employee of the predecessor contractor for whom the contractor or any of its subcontractors reasonably believes, based on the particular employee's past performance, has failed to perform suitably on the job.
> **(ii**
> **(A)** The contractor must presume that all employees working under the predecessor contract in the last month of performance performed suitable work on the contract, absent an ability to demonstrate a reasonable belief to the contrary that is based upon written credible information provided by a knowledgeable source such as the predecessor contractor and its subcontractors, the local supervisor, the employee, or the contracting agency.
> **(B)** For example, a contractor may demonstrate its reasonable belief that the employee, in fact, failed to perform suitably on the predecessor contract through written evidence of disciplinary action taken for poor performance or evidence directly from the contracting agency that the particular employee did not perform suitably. The performance determination must be made on an individual basis for each employee. Information regarding the general performance of the predecessor contractor is not sufficient to claim this exception.

Based on these regulations, it is not possible to find on the record as a whole that Adams was obligated to retain all of the incumbent employees. Further, although I credit Taylor's testimony that in a February 7 pre-application meeting held by Gagnon with incumbent employees,[31] Gagnon told employees

[31] Gagnon's testimony is not to the contrary. Although Gagnon had little recollection of the specifics of this meeting, he testified he did not tell employees that everyone would get a job. Taylor's testimony is consistent with this.

that "aside from disciplinary issues, he was 99 percent sure that we would all have a job," I find that, in context, this statement cannot be treated as a perfectly clear indication that the entire unit of Horizons employees would be hired.

According to Taylor, at a transition meeting, Gagnon announced that Adams was reducing the number of RAs to 15 and hiring 5 RCs, a new position. When Taylor questioned Gagnon about whether all 25 incumbent RAs would be hired, Gagnon responded that "aside from disciplinary reasons, he was 99 percent sure they would be hired." Viewed from Taylor's perspective, this statement did not make sense. In other words if there are 25 incumbent RAs and only 15 new RA positions, how could the 25 incumbent RAs all be hired. Taylor persisted, asking Gagnon how that was possible. Gagnon responded that DOL had approved the lower number. Gagnon's "99 percent" statement, in context, falls short of making it perfectly clear that all employees would be hired. Disciplinary reasons could disqualify some incumbent applicants from being hired and simple arithmetic would eliminate others.

Thus I find that Adams, through its statements and actions, did not actively or tacitly express a clear intention that it would retain all 25 incumbent RAs. Adams announced that it only had 15 RA positions and there were 25 incumbent RA potential applicants. The EO and DOL hiring criteria do not mandate hiring of all incumbents.

Further, even if Adams evinced an intention to hire all incumbent applicants, it clearly announced its intent to establish new conditions. Prior to beginning operations, Adams formulated its own operational plan and it told employees there would be a reduction in staff. In its hiring agreements, presented to each RA at the time of hire, Adams set forth wages, shifts, a mandatory arbitration agreement to resolve employment disputes, at will employment, a new disciplinary system, and new insurance. Based on these facts, I find that Adams was not a "perfectly clear" successor as envisioned in *Burns* and as limited by *Spruce Up.*

The General Counsel argues that *Spruce Up* should be reexamined in light of the number and scale of corporate mergers and acquisitions in the 40 years since it was decided. The General Counsel further argues that the majority holding in *Spruce Up* misconstrued *Burns* and has led to inconsistent results. It may be that this argument will be addressed by the Board but administrative law judges are bound by extant law. Thus I will not address these issues.

Although Adams is not a "perfectly clear" successor, it nevertheless had a duty to bargain with the Union because it unlawfully refused to hire its predecessor's employees. *Pressroom Cleaners,* supra, 361 NLRB 643, 643; *Planned Building Services,* supra, 347 NLRB at 674. An employer with an obligation to bargain collectively may not make changes to mandatory subjects of bargaining without first bargaining to valid impasse because it is a circumvention of the duty to negotiate which frustrates the obligation of Section 8(a)(5) as much as a flat refusal to bargain. *NLRB v. Katz,* 369 U.S. 736, 743 (1962).

Because Adams lost its *Burns* right to set initial terms by its unlawful refusal to hire its predecessor's employees, Adams was obligated to maintain the status quo by honoring the substantive terms as set forth in the expired collective-bargaining agreement with Horizons and to bargain with the Union about all changes to mandatory subjects of bargaining. There is no dispute that with regard to each of the alleged unilateral changes, Adams did not provide advance notice and an opportunity to bargain prior to implementation.

Removal of unit work by creating non-unit classification of Residential Coordinator and Non-Resident Counselor

Facts

Adams unilaterally established a new classification of RC consisting of five residential coordinators and one nonresident counselor.[32] The new RC position is treated by Adams as an entry-level supervisory, non-bargaining unit position. The new non-resident counselor position is also treated as a non-unit position.

The duties of RC and RA employees are substantially identical. Thus, both perform locker inspections, health and safety inspections, hold dorm meetings, counsel and direct students, and complete evaluations of student progress. Both report any incidents such as emergency transport or altercation directly to the center shift manager. Both have a desk in the office area of the dorm. At various times, depending on the day and shift, RAs and RCs are directly supervised by dormitory supervisors or in their absence by the center shift manager. There is no evidence that Adams interviewed for the RC position on an accelerated schedule as it did for upper management positions such as Center shift supervisor. There is no dispute that these duties are bargaining unit work. These same duties were performed by Charles King, the non-resident advisor for Horizons, except that he performed these duties off-campus for students who did not live in the dormitories. King was hired by Adams as a non-resident counselor, a non-unit position.

Removal of RA work from the bargaining unit and assigning it to RCs diverted bargaining unit work. The two classifications perform essentially the same duties. The work was lost to the bargaining unit although it is indisputably work historically performed by the unit. Adams did not bargain about the creation of the RC classification. It was announced prior to hiring.

Analysis

Adams was not free to remove work from the bargaining unit without proposing such a move to the Union and bargaining with the Union regarding removal of the work. The RA unit had an extensive bargaining history. As a successor, Adams continued the operations including the work of RAs with substantial continuity. Thus Adams assumed the historical unit. Mere change in ownership does not uproot bargaining units that have enjoyed a history of collective bargaining. *Indianapolis Mack Sales & Service, Inc.,* 288 NLRB 1123 fn. 5 (1988); see also, *SFX Target Center Arena Management, LLC,* 342 NLRB 725, 734 (2004) (units with extensive bargaining history remain

[32] Although the complaint alleges that Adams removed unit work by unilaterally creating a classification of non-residential counselor and eliminating the unit position of nonresidential advisor, this issue is not briefed and the record does not contain further elucidation regarding this allegation. Accordingly, this allegation is dismissed.

intact unless repugnant to the Act).[33]

Adams asserts that the RCs cannot be included in the bargaining unit because they are supervisory employees. I find they are not. There is no dispute that RCs have no authority to hire, transfer, suspend, layoff, discharge, recall, promote, reward, or assign duties. There is no evidence that they can meaningfully recommend such actions. According to Adams, the difference in the two positions is that RCs become the lead staff in the absence of the dorm supervisor while RAs do not. However, in at least one instance, an RA assumed this role. Further, if need be, RCs may be assigned to act as center shift manager. However, even as acting center shift manager, an RC may not authorize overtime or exercise supervisory functions such as disciplining employees. Although Adams argues that RCs are given higher levels of assignments such as providing input into evaluations of student progress, RAs also perform this function. Sometimes, dorm supervisors utilize RCs for assistance in completing CSSR, a weekly scoring system for students in each dorm or classroom. RAs also provide such feedback on an informal basis. The qualification for RA is a valid California driver's license and a high school diploma. Experience is preferable but not always required. The qualification for an RC is the same except experience is required.

RCs do not have authority to hire, fire, suspend, layoff, recall, or discipline RAs or promote them. RCs do not have authority to transfer. RCs may approve overtime only in an emergency situation if no one else is available and no one can be reached for approval by phone. They have not been told they are to supervise RAs. RCs fill in for the center shift manager RC pay is higher than RA pay. RCs may recommend employees to the dorm supervisor for discretionary incentives such as monthly awards, certificates or gift cards. The dorm supervisor need not pass these recommendations on to the social development director if the dorm supervisor disagrees with the recommendation. In any event, the social development director in consultation with the dorm supervisor makes the final determination on such matters. If the supervisor does not feel a recommendation is appropriate, it is not passed on. RCs do not complete performance evaluations for RAs. In the absence of a dorm supervisor, the RC ensures the RA is performing the regular duty of monitoring that clean-up duty is being done and ensuring that accountability meetings are conducted. RCs do not adjust employees' grievances.

The record as a whole reflects that RCs perform essentially the same work that RAs perform. Their intermittent substitution for supervisors without any indicia of supervisory authority does not transform them into supervisors. Moreover, even if RCs qualified as 2(11) supervisors, they may be voluntarily included in a bargaining unit. See, e.g., *Wackenhut Corp.,* 345 NLRB 850, 852–853 (2005).

[33] The General Counsel alleges that the creation of these new positions constitutes reassignment of unit work to non-unit employees. Citing *Hilton Environmental,* 320 NLRB 437, 439 fn. 12 (1995) (by unilaterally removing clerk position from bargaining unit, "perfectly clear" successor transferred unit work, a mandatory subject of bargaining), the General Counsel asserts that diversion of unit work is a mandatory subject of bargaining. Because I do not find that Adams is a "perfectly clear" successor, I do not rely on this case.

Having assumed the historic bargaining unit, employees—whether RAs or RCs—continue to spend most of their working hours performing the same tasks, using the same skills they had used in their work for the predecessor. When employees continue doing substantially the same work they did for a predecessor, the Board will not find that the addition of some new job duties is likely to change employee attitudes towards their jobs to such an extent that it defeats a finding of community of interest. *Phoenix Pipe & Tube Co.,* 302 NLRB 122 (1981), enfd. 955 F.2d 852 (3d Cir. 1991). Thus, I find that RCs perform substantially the same work as RAs. Creation of a substantially similar non-unit RC position diverted work to nonunit employees and Adams violated Section 8(a)(5) and (1) by diverting the unit work to nonunit employees.

Probationary Period

RAs were required to sign employment agreements at their orientation sessions on or shortly after March 11. One of the employment agreement subjects was a requirement that employees serve a 6-month introductory probationary period. The Horizons probationary period was three months and could be extended for another 90 days only if the employee failed to obtain a "meets expectations" evaluation. (Article IV. Probationary Period) Additionally, Adams applied its probationary period to predecessor unit employees.

Probationary periods constitute a mandatory subject of bargaining. *Puerto Rico Junior College,* 265 NLRB 72, 77 (1982). Thus, Adams violated Section 8(a)(5) and (1) when it failed to provide notice and opportunity to bargain prior to implementing the probationary period. See, *Camelot Terrace,* 357 NLRB 1934, 1936, 1941 (2011).

Discipline

The employment agreement also sets forth numerous grounds for discipline, up to and including discharge. The Horizons contract with the Union, on the other hand, provided that employees could be disciplined or disciplined for just cause pursuant to a progressive disciplinary system. (Article XII. Discipline). Employee discipline is a mandatory subject of bargaining. *Kennametal, Inc.,* 358 NLRB 553, 556 (2012) (relied upon by the General Counsel). There is no dispute that Adams failed to afford the Union notice or an opportunity to bargain regarding either the disciplinary system or the "at will" status of employees. Thus I find a violation of Section 8(a)(5) and (1) of the Act.[34]

Grievance Provisions

Another portion of the employment agreement mandates arbitration of "any and all disputes directly or indirectly arising out of or in any way connected with my employment with [Adams] or the termination of that employment . . ." Just to be clear, there is no allegation that this clause independently vio-

[34] In its brief, the General Counsel notes that the employment agreement also creates an "at will" status for employees and argues that this change should be found unlawful as well. The complaint does not allege that the "at will" status of employees was a unilateral change. Nevertheless, I find that restoration of the status quo to incorporate good cause should, in effect, remedy the "at will" situation.

lates the Act.[35] Rather, the relevant allegation is that insertion of arbitration into the employment agreement supplants the contract grievance mechanism (Article IV. Grievance Procedure) and thus constitutes a unilateral change. There is no dispute that the Union was not afforded notice and an opportunity to bargain about this mandatory subject of bargaining. Thus, I find that Adams violated Section 8(a)(5) and (1) by unilaterally instituting mandatory arbitration and failing to honor the terms of the grievance system of the expired contract.

Health Benefits

The status quo terms and conditions provided for health benefits for unit employees including medical, dental, and vision plans. Health benefits are a mandatory subject of bargaining. *The Southern New England Tel. Co.,* 356 NLRB 338, 351 (2010) (citing *Mid-Continent Concrete,* 336 NLRB 258, 259 (2001), enfd sub nom. *NLRB v. Hardesty,* 308 F.3d. 859 (8th Cir. 2002). Adams did not honor the health benefits in place. Rather, 30 days after beginning their employment, unit employees were eligible for Adams' health benefits. There is no dispute that the Union was not notified of this change. Thus, by unilaterally implementing its own health benefits without notifying the Union or providing an opportunity to bargain, Adams violated Section 8(a)(5) and (1) of the Act.

Shift Schedules

Horizons established employee shifts at the time of hire. Employees worked either the day shift, swing shift, or midnight shift without rotation into other shifts on various days of the week. When Adams began operations, it implemented a rotating shift for at least five of the RAs as reflected on their written offers of employment. As Section 8(a)(5) of the Act clearly states, hours of work are a mandatory subject of bargaining. There is no dispute that the Union was not notified of this change and there is no dispute that the Union was afforded an opportunity to bargain regarding this change. Accordingly, I find that by unilaterally instituting rotating shifts without notice or opportunity to bargain, Adams violated Section 8(a)(5) and (1) of the Act.

Union Dues

One further change to the status quo is alleged as a violation of Section 8(a)(5) and (1). This change does not derive from the employment agreement, however. Rather, this change constitutes alleged failure of Adams to adhere to its predecessor's terms and conditions of employment. As a successor who unlawfully refused to hire its predecessor's employees, Adams was required to maintain the status quo by continuing Horizons' terms and conditions of employment. *Pressroom Cleaners,* 361 NLRB 643, 643 (2014), citing *Advanced Stretchforming International,* 323 NLRB 529, 530–531 (1997), enfd. in relevant part 233 F.3d 1176 (9th Cir. 2000), cert. denied 534 U.S. 948 (2001); *Love's Barbeque,* 245 NLRB 78, 82 (1979), enfd. in relevant part sub nom *Kallmann v. NLRB,* 640 F.2d 1094 (9th Cir. 1981).

There is no dispute that Adams has not honored the dues-deduction provision of the Horizons contract. Adams admitted this allegation in its answer to the complaint and Gagnon confirmed that Adams was not honoring dues deduction. Although the Board (Chairman Pearce and Members Griffin, and Block; Member Hayes dissenting) held that an employer must continue to honor dues-checkoff provisions of a collective-bargaining agreement even after expiration of the contract, [36] the continuing validity of that decision is in doubt due to the constitutionality of two of the Members' appointments.[37] Accordingly, prior precedent,[38] which did not recognize a continuing duty to honor dues checkoff postexpiration, controls and requires that this allegation be dismissed.

ALAN RITCHEY ALLEGATIONS

In *Alan Ritchey, Inc.,* 359 NLRB 396, 396–397, 403–405 (2012), a three-member panel of the Board (Chairman Pearce and then-Members Griffin and Block) held, inter alia, that during the period after a union is recognized but before a first contract or an interim grievance procedure is in place, an employer must bargain with the union before exercising its discretion to impose certain discipline such as suspension, demotion, or discharge. Recognizing that it had never before clearly and adequately explained that the duty to bargain over discretionary changes in terms and conditions of employment included discipline such as suspension, demotion, or discharge, the Board applied its decision prospectively only.

However, two years later, in *Noel Canning,*[39] the recess appointments of Members Griffin and Block were held invalid. Since *Noel Canning's* issuance, *Alan Ritchey* has not been adopted or reaffirmed by a validly-constituted Board. Nevertheless, the complaint alleges that when Adams imposed discretionary discipline by discharging five employees it violated Section 8(a)(5) and (1) of the Act because it did not first bargain with the Union as required in *Alan Ritchey*. [40]

[35] In *Murphy Oil USA, Inc.,* 361 NLRB 774 (2014), the Board adopted the holding of *D. R. Horton,* 357 NLRB 2277 (2012), reversed in relevant part, 737 F.3d 344 (5th Cir. 2013), reaffirming that an employer violates the Act when, as a condition of employment, it requires employees to sign an agreement that precludes them from filing joint class or collective claims regarding wages, hours or other working conditions against the employer in any forum, arbitral or judicial.

[36] WKYC-TV, 359 NLRB 286, 293 (2012).

[37] In *Noel Canning,* 573 U.S. ___, 134 S.Ct 2550 (2014),), the Court held that the President's authority to make recess appointments does not extend to three-day periods between pro forma sessions) Then-Members Griffin and Block were appointed during three-day periods between Senate pro forma sessions and their appointments were held invalid.

[38] *Bethlehem Steel,* 136 NLRB 1500 (1962), remanded on other grounds sub nom. *Marine & Shipbuilding Workers v. NLRB,* 320 F.2d 615 (3d Cir. 1963).

[39] *NLRB v. Noel Canning,* supra (President's authority to make recess appointments does not extend to three-day period between pro forma sessions).

[40] In *McKesson Corp.,* JD(ATL)–30–14 (Nov. 4. 2014), Administrative Law Judge Locke refused to apply *Alan Ritchey* due to its *Noel Canning* infirmities. However, in other instances Administrative Law Judges Cates and Etchingham found the reasoning of *Alan Ritchey* persuasive and relied on it. See, *SMG Puerto Rico, II,* JD(ATL)–07–15 (April 17, 2015); *Latino Express,* JD(SF)–09–15 (March 17, 2015); and *South Lexington Management Corp.,* JD(ATL)–02–15 (Jan. 29, 2015)

It is unclear whether the current Board will adhere to *Alan Ritchey.* Although the General Counsel continues to urge that *Alan Ritchey* was correctly decided, until it is reaffirmed or adopted by the Board, it is not controlling. The analysis in *Alan Ritchey* is quite persuasive and it is tempting to apply it, assuming that at some point it will be adopted by a duly appointed-Board. However, I am mindful that in *Alan Ritchey* the Board recognized it had not previously explained the duty to bargain over discretionary imposition of discipline and determined that due process required prospective application only. Three of the four discharges involved here post-dated *Noel Canning* and thus occurred when it was clear that *Alan Ritchey* could no longer be relied upon. Under these circumstances, it would work an injustice to require Respondent to adhere to *Alan Ritchey.*

Were *Alan Ritchey* applied here, the allegations would be meritorious. There is no dispute that RAs Sheila Broadnax, Rolando Aspiras, Bienvenida Viloria, and Vicente Moran were discharged after Adams began its operations. Adams utilized discretion under its unlawfully implemented employment agreement terms. Progressive discipline was not included in the employment agreement terms. Rather, the employment agreement set forth numerous grounds for discretionary discipline up to and including discharge.[41] Thus there can be no doubt that discretion was utilized. Further, there is no dispute that the Union was not afforded notice or an opportunity to bargain regarding the discharges. Finally, although the expired contract contained a grievance procedure, Adams had unlawfully supplanted it with a mandatory arbitration agreement so there was no binding agreement with the Union covering discipline.

Ultimately, however, it is unnecessary to determine whether failure to afford notice and the opportunity to bargain over these discharges would have violated *Alan Ritchey.* These employees were discharged pursuant to the terms of unlawfully implemented employment agreements which removed progressive discipline. Thus, these discharges are subsumed in the prior finding that Adams unlawfully implemented the terms of the employment agreements rather than adhering to the status quo ante of just cause and progressive discipline and the further finding that Adams unlawfully ceased adhering to the Horizon's contract grievance procedure. The remedy for these violations will require restoration of the status quo, reconsideration of the discharges applying the contractual just cause standard, and waiver of time limits for filing grievances on behalf of these employees should Respondent's reconsideration result in a discharge finding.

BARRING TAYLOR'S ACCESS TO THE CENTER

Facts

The General Counsel alleges that Respondent selectively and disparately enforced a no access rule against Taylor to bar her from the Center. The rule states:

> Former staff and students, regardless of reason for separation, will not be allowed on Center without the prior authorization of the Center Director or his/her designee.
>
> No group or individual who has been previously barred from the Center or whose purpose can reasonably be expected to create controversy or disturbance among staff members of students, or who might interfere with their welfare or training, will be allowed on-Center.

Prior to the first bargaining session, set for September 10, the Union requested that bargaining be held at the Center. Respondent refused to bargain at the Center stating that it would not allow Taylor on the Center premises. At the September 10 bargaining session held at the Union hall, the Union renewed its request to bargain at the Center. At the second and third bargaining sessions, held October 14 and November 17 respectively, the Union continued to raise the issue of Taylor's access to the site for bargaining and Adams continued to deny the request to meet at the Center. After the third session, the Union was notified in early December that Taylor would be allowed onto the Center. The fourth session, held on January 9 or 10, 2015, was at the Center.

Analysis

Adams' rule barred access to "former staff" and individuals who might "create controversy or disturbance . . . or who might interfere with [staff members or student] welfare or training" Adams' refusal to allow Taylor onto the Center involved at best a misinterpretation of Adams' rule barring former staff from the Center. Taylor was not a former staff of Adams. Further, there is no evidence that Taylor might interfere with the welfare or training of staff or students. Were there such evidence, there might have been some legitimacy to Adams' interpretation of the rule. What remains to enlighten understanding of Adams' interpretation of the rule is its anti-union animus. Thus it is apparent that Adams did not desire Taylor's presence at the Center to conduct Union business because she was the Union president.

Relying on *Modern Honolulu,* 361 NLRB 228, 229 (2014), the General Counsel urges that the bargaining access of union representatives who are former employees constitutes a refusal to bargain in good faith. Taylor's presence as Union president was of paramount importance to the Union. There is no evidence that her presence would create ill will or in any way make good faith bargaining impossible. In agreement with the General Counsel, I find that by banning Taylor from the Center from September through early December, Respondent refused to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act.

REFUSAL TO MEET FOR BARGAINING AT REASONABLE TIMES AND PLACES

Facts

The General Counsel alleges that Respondent refused to meet with the Union at reasonable places not only by selectively and disparately enforcing a work rule against Union president Taylor to bar her from the Center but also by generally refusing to bargain at the Center. The record reflects that Horizons and the Union bargained at the Center. Moreover, the

[41] The employment agreement included examples of offenses for which employees could be disciplined, up to and including dismissal. This provision alone illustrates a high degree of discretion regarding the degree of discipline for each offense.

General Counsel asserts that Respondent refused to meet at reasonable times by insisting on meeting at 5 p.m. rather than at 3:30 p.m. The record reflects that Horizons and the Union met at 3:30 p.m. through a release time system in order to accommodate employee-negotiators.

Analysis

The complaint does not allege that Adams altered a past practice. Rather, it alleges failure to meet at reasonable times and places. No authority is cited for the proposition that insisting on meeting at an inconvenient time of day for a member of the other side's bargaining committee constitutes refusal to meet at reasonable times. As the "reasonable times" concept is typically understood, it refers to meeting a reasonable number of times and in meetings long enough to accomplish good faith bargaining. *Calex Corp.,* 322 NLRB 977 (1997), enfd. 144 F.3d 904 (6th Cir. (1998). As the Board has stated in a situation in which the "busy negotiator" defense was attempted, "Considerations of personal convenience, including geographical or professional conflicts, do not take precedence over the statutory demand that the bargaining process take place with expedition and regularity." *Caribe Staple Co.,* 313 NLRB 877, 893 (1994). Thus I find that by refusing to meet at 3:30 p.m., Adams did not refuse to meet at reasonable times. I further find that to the extent the General Counsel alleges that Adams refused to meet at "reasonable places," this is subsumed in my finding above that Adams refused to bargain in good faith by unlawfully enforcing its access rule to ban Taylor from the Center.

CONCLUSIONS OF LAW

1. Since at least March 11, 2014, Adams has been a successor employer to Horizons and was obligated to recognize and bargain with the Union, as the exclusive representative within the meaning of Section 9(a) of the Act, in the following unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All Full-time Residential Advisors, Non-Residential Advisors, and Day Residential Advisors employed at the Sacramento Job Corps Center.

2. By refusing to hire Shannon Cousins-Kamara, Macord Nguyen, Genesther Taylor, and Azaria Ting and by rescinding its offer to Andre Lang in an attempt to avoid the obligation to recognize and bargain with the Union as the exclusive collective-bargaining representative of unit employees, Adams has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

3. By unilaterally implementing changes to certain mandatory terms and conditions of unit employees' employment, Adams violated Section 8(a)(5) and (1) of the Act. These changes are as follows:

(a) Removing work from the unit by replacing RA positions with new RC positions;

(b) Ceasing to give effect to the progressive disciplinary and just cause provisions of the most recent collective-bargaining agreement between Horizon and the Union;

(c) Ceasing to give effect to the grievance provision of the most recent collective-bargaining agreement between Horizon and the Union;

(d) Eliminating unit employees health benefits;

(e) Changing from a fixed shift schedule to a rotating shift schedule for some unit employees; and

(f) Modifying the terms of the probationary period for unit employees.

4. By failing to afford the Union notice and an opportunity to bargain prior to the discretionary discharges of Sheila Broadnax, Macord Nguyen, Bienvenida Viloria, Rolando Aspiras, and Vicente Moran, Adams did not violate Section 8(a)(5) and (1) as set forth in *Alan Ritchey,* 359 NLRB 396 (2012), because *Alan Ritchey* has not been reaffirmed or adopted by a validly-appointed panel of the Board. Nevertheless, due to Adams' disregard of the progressive discipline and just cause terms and the grievance provisions of the Horizons contract, these discharges are subsumed in the remedy for the unilateral changes.

5. By selectively and disparately enforcing an access rule against Genesther Taylor, a Union agent, who sought entry to the Center for purposes of bargaining with Adams, Adams failed to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act.

6. By insisting on meeting at 5 p.m., Adams did not violate Section 8(a)(5) and (1) of the Act.

JOINT EMPLOYER

Having found that the Respondent Adams has engaged in certain unfair labor practices, it now remains to be determined whether, as alleged by the General Counsel, MJLM should also be held liable for remedying these unfair labor practices as a joint employer.

To establish that two or more employers are joint employers of a single work force, there must be a showing that the employers share or codetermine essential terms and conditions of employment such as hiring, firing, discipline, supervision, and direction. *CNN America, Inc.,* 361 NLRB 439, 440–441 (2014), correcting Order on denial of reconsideration, 2015 WL 1292226 (March 20, 2015). The standard relied upon in *CNN,* was originally adopted in *Laerco Transportation,* 269 NLRB 324 (1984), and *TLI, Inc.,* 271 NLRB 798 (1984), enfd 772 F.2d 894 (3d Cir. 1985). Other factors considered include an employer's involvement in decisions relating to wages and compensation, the number of job vacancies to be filled, work hours, the assignment of work and equipment, employment tenure, and an employer's involvement in the collective bargaining process. *CNN*, supra, slip op. at 3 n.7, and 7.

Facts

The management services agreement between Adams and MJLM, signed on February 13, provides that Adams will provide the following management services to MJLM:

- Overall Center performance management and direction;
- Proposal development, implementation, and compliance oversight;
- Policy, plan, and procedure development, submission, and implementation;
- Job Corps operational and technical assistance;

- Program assessment, direction, oversight, and integrity audits;
- Participation in corporate training (staff travel and per diem at MJLM expense)
- Transition assistance; and
- Mentor MJLM in the operation of the Sacramento Job Corps Center.

The General Counsel specifically relies on codetermination of wages, MJLM's involvement in interviewing and hiring Adams employees, MJLM's exclusive determination of holiday schedules, MJLM's retention of operational control requiring that Adams Deputy Center Director McGillis report directly to MJLM Center Director Erica Evans, and Adams provision of core services in fulfillment of MJLM's contract with DOL.

As to wages, the wage levels for all staffing were developed through a salary survey provided by DOL as well as local area wage information. Although Gagnon stated that the wage structure was "jointly developed" between Adams and MJLM in his Board affidavit, he stated at the hearing that he did not know any specifics about such "joint" development. Gagnon did agree that the wage rates for all Center positions were reflected in the joint proposal to DOL.[42] I find, based on Gagnon's affidavit to the Board as well as the joint proposal to DOL, that the wage structure in general was developed jointly between Adams and MJLM.

The subcontract agreement provides that Adams will, "Provide a staff schedule that establishes required coverage and services on a 24/7 basis. Center holidays shall be observed in accordance with MJLM prime contract. . . ." Adams alone is responsible for ensuring that its staff "meet the minimum requirements and possess the necessary educational criteria, experience and skills as established by USDOL and MJLM." MJLM is required to provide advance notification to Adams prior to taking any personnel action affecting Adams' direct staff. Further, "MJLM reserves the right to suspend and/or remove Adams' staff from the Center if staff willfully violate Center rules, regulations and/or established policy standards." Based on these provisions, I find that in general the staff schedule for Adams' employees is set solely by Adams and Adams alone is responsible for ensuring that its staff meets all hiring criteria required by USDOL and MJLM. However, MJLM has reserved a right to take personnel action against Adams staff for violation of Center rules or policies and MJLM sets the holiday schedule.

MJLM and Adams have separate benefit packages and disciplinary policies. When Gagnon first spoke to employees about the Adams' application process, Sharon Murphy spoke to employees also about the MJLM application process.

During the transition period, MJLM sometimes conducted interviews for Adams' applicants. Each evening, both MJLM and Adams reviewed the Sacramento Direct Hire List to determine which positions remained vacant which had been filled. For instance, Don Khajavi, a consultant for MJLM assisting in the transition, interviewed Broadnax and Ostrowski and recommended both of them for hire. MJLM partner Sharon Murphy interviewed Diane Calahan. Thus, at least during the transition period, Adams and MJLM jointly determined which employees Adams would hire.

Weldon prepared interview packets for the interviewers (including resumes, applications, an evaluation form, and an offer sheet) and drafted offer letters for successful applicants and rejection letters for applicants who did not receive offers. MJLM prime contractor Sharon Murphy worked with the Adams team as did MJLM human resources director Joyce Barrett and several other MJLM personnel.

During the transition period, Murphy interviewed newly hired Center director Evans about Horizons employees including Romona Anthony, a Horizons clerk. Afterwards, Murphy and Gagnon discussed Anthony as a wellness monitor, a position Adams was filling. They also discussed one other applicant for an Adams position whom Murphy had discussed with Evans. None of the other employees discussed by Murphy with Evans were for positions being filled by Adams.

Pagni described Adams relationship with MJLM as not only a subcontractor but also a mentor. She was aware that Adams' SOPs were sent to MJLM but she did not send them.

According to Weldon, she and MJLM HR director Barrett shared an office in the transition center and consulted with each other on human resources matters. Since this was MJLM's first contract, Weldon was instructed by Gagnon to share information and assist as needed so that the transition would run smoothly. Weldon characterized her role as mentoring or coaching. Further, because Adams was a subcontractor of MJLM, the parties decided to "be under the same umbrella." In other words, forms that were utilized by Adams were given to MJLM to revise and use. Interview forms, standard operating procedures,[43] job descriptions were shared with MJLM. MJLM utilized Adams' standard operating procedures after Adams changed the titles, headers and footers to reflect MJLM.

Each evening, Barrett and Weldon updated the Direct Staffing List to fill in the names of employees who were hired by each company. The list was presented to the team leaders on a daily basis. Additionally, Barrett and Weldon shared forms such as hiring forms and information such as standard operating procedures. Weldon explained that she revised the Adams' standard operating procedures to reflect MJLM because Adams was not the prime contractor. This basically involved changing the headers and footers from Adams to MJLM.

Adams provides residential counseling, career preparation and transition, recreation and wellness services. These services are central to the effectiveness of the Center. In operating the Center, McGillis, the highest ranking Adams representative on site, consults with MJLM director Evans on matters such as students, dormitories, career and social counseling, and policies

[42] Later, in response to questioning from MJLM's counsel, Gagnon corrected his characterization of the term "joint proposal" stating that Adams submitted its information to MJLM and MJLM incorporated this information into a single proposal to the DOL. (Tr. 731). This appears to be a distinction without a difference.

[43] Pagni testified that Adams' SOPs were revised to state "Sacramento Job Corps" but do not indicate MJLM on them anywhere. This testimony does not necessarily contradict Weldon's testimony and, in any event, because Weldon was on the scene in Sacramento and Pagni was not, I credit Weldon's testimony.

of the Center. McGillis consults also with Adams executive director Gagnon on matters regarding Adams issues such as staffing.

Analysis

At least during the transition period, the relevant period for purposes of this analysis, MJLM shared or codetermined essential terms and conditions of employment of Adams' employees. Thus, the initial wage structure was jointly developed. There is no further elucidation regarding ongoing wage issues beyond the transition period. The record does not reveal whether MJLM continues to be involved in Adams' employee wages. However, the time period which is relevant for this analysis is the transition period and immediately thereafter. During that time, MJLM and Adams jointly developed the Adams wage structure.

Adams employees follow the MJLM holiday schedule. Although this does not give MJLM blanket control over hours of work, it is evidence of some control over hours. MJLM has retained some functions to discipline Adams' employees subject to notice to Adams.[44] Through routine consultation between McGillis and Evans, MJLM is informed on all matters performed by Adams.

During the transition period, MJLM representatives interviewed Adams applicants and meaningfully recommended whether these applicants were to be hired. There is no evidence that this involvement in hiring has continued past the transition period and I will not make this assumption. However, there was joint control over hiring during the transition period.

The fact that Adams' highest ranking official reports to MJLM's highest ranking official on site ensures a coordinated operation. This is consistent with MJLM being the prime contractor but does not, standing alone, warrant an inference that MJLM dictates how Adams will provide specific services.

Of course, as the General Counsel points out, Adams Sacramento RAs work exclusively for MJLM. However, it should be noted that Adams has RAs working in many other locations. Although the fact that a subcontractor's employees worked exclusively for CNN was relied upon in part in *CNN,* supra, the facts here are easily distinguished. CNN retained considerable authority over hiring, supervision and direction of the employees of TVS. There is no evidence that MJLM retains such authority. CNN prohibited hiring employees from CNN competitors.

There is no evidence that MJLM has such a prohibition. CNN retained substantial control over the number of technicians to be hired by TVS, CNN retained control over the number of hours and the overtime hours of TVS technicians, and field staff assignments were made by CNN. MJLM does not have these authorities. There is no evidence that it controls the number of RAs, their hours of work or eligibility for overtime. There is no evidence that MJLM makes assignments to Adams' staff.

Thus, based on the record as a whole, I find that Adams and MJLM were joint employers during the relevant period herein. MJLM shared or codetermined matters governing the essential terms and conditions of employment of Adams' employees including meaningfully affecting hiring, discipline, and direction.

Alternatively, the General Counsel urges the Board to abandon its existing joint employer standard claiming that standard undermines the policy of the Act to encourage stable and meaningful collective bargaining.[45] Thus, the General Counsel urges a return to the Board's "traditional" pre-*Laerco,* pre-*TLI* standard. Under this approach, in an analysis of whether two entities share or codetermine or meaningfully affected the other's terms and conditions of employment, "no distinction [would be made] between direct, indirect, and potential control over working conditions and would find joint employer status where 'industrial realities' make an entity essential for meaningful bargaining."[46] This would include situations where the putative joint employer wielded sufficient influence through direct control, indirect control, or potential control such that meaningful bargaining could not occur in its absence. Further, the putative joint employer's control over working conditions might be based not on specific contractual provisions but on the industrial realities of certain business relationships that make an entity essential for meaningful bargaining. The essential inquiry would be the influence or potential influence of the putative joint employer over employees' working conditions and thus on the collective-bargaining process.[47]

There may well be important policy reasons to return to the Board's earlier test for determining joint employer status. However, these matters are more appropriately addressed to the Board. Thus, in conclusion, I find that MJLM and Adams are joint employers and they are jointly and severally liable for all unfair labor practices.

REMEDY

Having found that Respondents have engaged in certain unfair labor practices, I shall order them to cease and desist from such violations and take certain affirmative action designed to effectuate the policies of the Act.

Having discriminatorily refused to hire Cousins-Kamara, Nguyen, Taylor and Ting and having discriminatorily rescinded

[44] MJLM relies on *AM Property Holiday Corp.,* 350 NLRB 998, 1000 (2007), in which the Board disregarded lease agreement language and relied instead on the employer's actual role. There is, however, no evidence contrary to the lease agreement language in this case. Thus, I rely on it.

[45] See Amicus Brief of the General Counsel in *Browning-Ferris Industries,* 32–RC–109684, currently pending before the Board.

[46] General Counsel's Amicus Brief at p. 17, *Browning-Ferrris Industries,* supra.

[47] *Floyd Epperson,* 202 NLRB 23, 23 (1973), enfd., 491 F.2d 1390 (6th Cir. 1974) (joint employer status found where user firm with indirect control over employee discipline and wages informed Epperson, the supplier firm, that a particular drivers was consistently late and Epperson thereafter removed the employee from the route, and where Epperson increased the drivers' wages when it was given a raise by the user firm), enfd. mem. 494 F.2d 1390 (6th Cir. 1974); *Globe Discount City,* 171 NLRB 830, 830–832 (1968) (licensor was joint employer of its licensee's employees where the licensor retained substantial contractual power "to control or influence the labor policies of the licensees," and retained "the right to terminate either license for default," thereby insuring "that its wishes in regard to labor relations matters will be carried out by the licensees").

Lang's offer of employment, Respondents must offer them instatement and make them whole for any loss of earnings and other benefits as set forth in *Pressroom Cleaners,* supra at 361 NLRB 643, 648 (that is restoration of the predecessor's terms and conditions until the parties bargain in good faith to agreement or impasse. Employer may no longer attempt to prove what the terms and conditions would have been if it had complied with its obligation to bargain). Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

Respondents shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondents shall also compensate the discriminatees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Don Chavas, LLC d/b/a Tortillas Don Chavas* 361 NLRB 101 (2014).

Respondents will be ordered to rescind the changes it made to mandatory terms of employment and implement in their place the terms of the Horizons' contract. Thus Respondents must rescind removal of work from the bargaining unit, rescind the employment contract discipline provision, rescind the unilaterally implemented arbitration agreement in the employment contract, rescind elimination or substitution of health benefits, rescind the rotating shift schedule, and rescind modification of the probationary period.

In ordering Respondents to rescind the employment contract discipline provision, Adams must also reconsider the discharges of Sheila Broadnax, Bienvenida Viloria, Rolando Aspiras, and Vicente Moran pursuant to the just cause provisions of the Horizons collective-bargaining agreement and, if those discharges are upheld on reconsideration, waive any time limits for the filing of grievances regarding those discharges.

I also recommend that Respondents be ordered, within 14 days after service by the Region, to post an appropriate "Notice to Employees" in order that employees may be apprised of their rights under the Act and the Respondents' obligation to remedy their unfair labor practices.

[Recommended Order omitted from publication.]